

EXHIBIT 7

In re Calpine Corp., Case No. 05-60200 (CGM) (Jul. 24, 2007) [Docket No. 5749]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of

CALPINE CORPORATION, et al.,
Debtors.

Case No.
05-60200

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IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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In the Matter of

THE COMPANIES' CREDITORS ARRANGEMENT ACT, Action No.
R.S.C. 1985, c. C-36, AS AMENDED 0501-17864
AND IN THE MATTER OF
CALPINE CANADA ENERGY LIMITED, et al.,

Applicants.

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July 24, 2007
United States Custom House
One Bowling Green
New York, New York 10004

Joint Hearing with Canadian Judge in re: Debtors'
Motion for an Order to Approve Global Settlement with
Calpine Canadian Debtors and Other Relief; Approval of Bond
Sale; Debtors' Emergency Motion with Respect to CCAA
Proceedings; Debtors' Partial Objection to Proof of Claim.

B E F O R E:

HON. BURTON R. LIFLAND,
U.S. Bankruptcy Judge
- and -
HON. B.E.C. ROMAINE,
Queen's Bench Justice

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1 P R O C E E D I N G S:

2 JUDGE LIFLAND: Please be seated.

3 THE CLERK: It's the clerk from Calgary we
4 are ready to commence.

5 JUDGE LIFLAND: Good afternoon.

6 MR. SELIGMAN: Good afternoon, your Honor.

7 JUDGE LIFLAND: This is the joint hearing
8 before The Court of Queen's Bench of Alberta and the U.S.
9 Bankruptcy Court for the Southern District of New York.

10 While not the first of such joint hearings,
11 it is the latest to recognize that debtors with assets and
12 creditors and insolvency proceedings in more than one state
13 have an urgent need for cross-border cooperation and
14 coordination, and the supervision and administration of
15 their assets and affairs.

16 At the very least, these joint proceedings
17 contemplated by court approved protocols, provide the forum
18 for cross-border access and recognition for the stake
19 holders on both sides of the border. And I, for the New
20 York court, welcome all the stakeholders in Canada as well
21 as recognizing those here in the US.

22 It's my understanding that the parties have
23 agreed on a scheduling of the presentation; is that
24 correct?

25 MR. SELIGMAN: David Seligman for the US

1 debtors, your Honor, that is correct.

2 JUDGE LIFLAND: Do you want to be heard on
3 that, Mr. Seligman?

4 MR. SELIGMAN: Yes, your Honor.

5 Your Honor, Seligman on behalf of the
6 United States debtors in the Chapter 11 cases of Calpine
7 Corporation, case number 05-60200 --

8 JUDGE LIFLAND: Can Mr. Seligman be heard?

9 JUSTICE ROMAINE: Yes, we can hear Mr.
10 Seligman. Thank you.

11 MR. SELIGMAN: Thank you, your Honor.

12 We are here this afternoon on a motion for
13 a global settlement between the United States and Canadian
14 debtors and certain other parties. We are also here
15 pursuant to that cross-border insolvency protocol for
16 Calpine Corporation and its affiliates approved by the
17 United States court on April 12, 2007, and by the Canadian
18 court on April 4, 2007.

19 Your Honor, I was going to turn to some of
20 the logistical matters, including the order that the
21 parties have agreed to, if I can proceed?

22 JUDGE LIFLAND: Certainly.

23 MR. SELIGMAN: Your Honor, just as a
24 logistical matter for the people in the courtroom, the
25 clerk admonished us previously, just to make sure that

1 there is --

2 JUDGE LIFLAND: May I just interrupt a
3 moment?

4 MR. SELIGMAN: Sure.

5 JUDGE LIFLAND: There seems to be some
6 background speaking that's coming across the loudspeakers.

7 JUSTICE ROMAINE: Okay. Judge Lifland, I
8 don't think there's any noise from this court that I can
9 detect. I do want to tell you, though, that your voice is
10 not coming across as clearly, perhaps, as we would like it.
11 We can hear Mr. Seligman clearly, but not you.

12 JUDGE LIFLAND: Well, I'll try to swallow
13 the microphone.

14 JUSTICE ROMAINE: Okay, thank you.

15 MR. SELIGMAN: Your Honor, just for
16 everyone here in the courtroom, the check admonish to
17 admonished the people here to please keep background noise
18 to a minimum because the microphones are very sensitive. I
19 will do my best, and I would everyone else who is speaking
20 here today to make sure that they are speaking slowly and
21 clearly, and also being cognizant of the proceedings in the
22 Canadian court, to the extent that there needs to be an
23 interruption or a pause in the proceedings.

24 I would also ask that people make sure to
25 state their names clearly every time they speak for the

1 benefit of the court reporters.

2 Your Honor, in the spirit of comedy and
3 cooperation, the US debtors and the Canadian debtors had
4 met with each other and discussed the orders of proceedings
5 for this morning, particularly in light of the objections
6 that had come in. And we had prepared a suggested schedule
7 that had been previously provided to both the US court as
8 well as the Canadian court, and I would like to outline
9 that process for this morning.

10 JUDGE LIFLAND: I'm going to interrupt for
11 a moment. There may be no conversation in each of the
12 courtrooms, but if there are open telephone lines, that may
13 be the source of the conversations.

14 JUSTICE ROMAINE: Okay. Mr. Robinson?

15 MR. ROBINSON: My Lady, I don't have any
16 technical knowledge at all, but perhaps I could suggest,
17 with the indulgence of the folks on our line, that we put
18 this telephone on mute.

19 JUSTICE ROMAINE: Let's do that.

20 MR. ROBINSON: Let's see if that solves the
21 problem.

22 JUSTICE ROMAINE: Okay, we'll try that,
23 Judge Lifland, and hopefully that will help.

24 JUDGE LIFLAND: Thank you.

25 JUSTICE ROMAINE: It is muted already.

1 MR. ROBINSON: Mr. Seligman, does that make
2 a difference in your courtroom?

3 MR. SELIGMAN: Well, I guess we'll see. Is
4 that better, Judge Lifland?

5 A VOICE: The fact that no one on the line
6 will be able to hear this proceeding --

7 MR. ROBINSON: We went the wrong way. I
8 guess we could ask the folks --

9 JUSTICE ROMAINE: But they won't hear you,
10 Mr. Robinson.

11 MR. ROBINSON: I'm sorry, I've demonstrated
12 my ignorance already. But perhaps we could ask the people
13 that are listening in to our proceedings by telephone to
14 mute their lines, unless they need to speak, and see if
15 that solves the problem of interference in Judge Lifland's
16 courtroom.

17 JUSTICE ROMAINE: Thank you. And
18 unfortunately none of these people are able to respond to
19 that request because of the way we've set it up, but, Judge
20 Lifland, if you can see if that will make a difference.

21 JUDGE LIFLAND: It sounds already as if
22 they've got the message.

23 JUSTICE ROMAINE: Okay, thank you.

24 MR. SELIGMAN: Your Honor, the way that we
25 had suggested to proceed this morning was for the US

1 debtors to make some introductory remarks followed by the
2 Canadian debtors making similar introductory remarks with
3 respect to the motion. We will then come back to the US
4 court for the US debtors to make their presentations,
5 submissions and evidence, if necessary, with respect to the
6 motion. And then refer it to the Canadian court to have
7 the Canadian debtors make their submissions.

8 With each pair of submissions, we would
9 also include statements in support or statements of non
10 opposition to the settlement agreement before the courts
11 this morning. We would then come back to the US court to
12 consider objections to the settlement agreement there.

13 And just to pause on that for a moment,
14 your Honor, there are basically four objections filed to
15 the settlement. One filed by the ULC1 trustee, one filed
16 by the ULC2 trustee, one filed by the Canadian income fund,
17 and one filed by what we will refer to as the CCRC
18 committee.

19 The objection of the ULC21 indentured
20 trustee is really the only substantive objection to the
21 settlement on the US side, i.e. that there is perhaps a
22 violation of US law. The other three objections really go
23 to the aspect of the settlement that may be allegedly
24 violative of Canadian law, and is really more appropriately
25 directly, in our opinion, to the Canadian court. So we

1 envision that there will be argument with respect to the
2 ULC1 indentured trustee followed by perhaps free statements
3 by the other objectors, to the extent they want to make a
4 statement here in this court understanding that perhaps the
5 balance or the majority of their presentations will be made
6 in the Canadian court.

7 Once we have done that, your Honor, then I
8 think we will have then completed our submissions and the
9 responses and the replies in both courts, and it will be up
10 to the courts to entertain any questions or comments, and
11 then we can proceed from there.

12 The one other point I did want to make was
13 with respect to the ULC1 indentured trustee's objection.
14 There has been some continuing dialogue right before the
15 hearing and is going on right now. I think that, depending
16 on where we are at that particular moment, we may ask that
17 you put that objection off until after the Canadian
18 objectors make their submissions to the Canadian court to
19 give more opportunity to perhaps reach a resolution and to
20 consider their objection, to the extent it still remains,
21 at the end of the process.

22 If that's acceptable to your Honor and My
23 Lady, that's how we would like to proceed this morning.

24 JUDGE LIFLAND: That's acceptable to this
25 court.

1 Madam Justice.

2 JUSTICE ROMAINE: Thank you, Judge Lifland.
3 And I want to say first thank you for your words of welcome
4 and your words with respect to the importance of this
5 cross-border proceeding, words that I certainly agree with.
6 I would like to welcome you, the US debtors, and the US
7 stake holders to these proceedings in the Court of Queen's
8 Bench of Alberta.

9 Having said that, I will turn to Mr.
10 Robinson and Mr. Meyers to respond to what Mr. Seligman has
11 said with respect to the procedure before us this
12 afternoon.

13 Mr. Robinson?

14 MR. ROBINSON: For the record, Larry
15 Robinson of McCarthy Tetrault for the Canadian debtors.

16 My Lady, your Honor, we have received from
17 Mr. Seligman the proposed outline of schedule of
18 submissions on behalf of the Canadian applicants. That
19 schedule, we think, is a logical approach and we are in
20 agreement with that schedule and in fact have indicated to
21 your Ladyship in the past of this hearing that that is the
22 order that we would be recommending to this court as well.

23 The only addition I would make is that, as
24 is customary in Canadian proceedings, given the existence
25 of our monitor, at the conclusions of the applications by

1 the Canadian debtors and statement of support for the
2 Canadian debtors, we would propose that the monitor make
3 any submissions it wishes to make with respect to the
4 applications before objections are commenced by folks.

5 JUSTICE ROMAINE: Thank you. Does anybody
6 else wish to address procedure?

7 Thank you. Judge Lifland, we are back to
8 you.

9 JUDGE LIFLAND: Thank you, Madame Justice.
10 Mr. Seligman, you may start your
11 presentation.

12 MR. SELIGMAN: Thank you, your Honor.

13 Your Honor, just before I proceed this
14 morning, if it's acceptable with your Honor, I would like
15 to introduce just a couple of people in the courtroom
16 before we proceeded, just for the benefit of the Canadian
17 court.

18 JUDGE LIFLAND: Certainly.

19 MR. SELIGMAN: Your Honor, with me this
20 afternoon from Kirkland and Ellis is Thomas Clare and Todd
21 Maynes who are here. They may be speaking to your Honor
22 this morning, hopefully not, if we can resolve everything,
23 but we'll see where we go on that front. I also did want
24 to introduce Monique Jilesen of the law firm of Lenczner
25 Slaght. She is Canadian counsel to the US debtors, and I'm

1 sure is familiar to the Canadian court already.

2 I also would like to introduce David
3 Johnston, managing debtor at Alix Partners. Mr. Johnson
4 has been instrumental throughout this process of trying to
5 reach a resolution with the Canadian debtors and had
6 personally daily involvement from the business and from the
7 financial side to try to bring this settlement to where it
8 is today.

9 I would also like to just introduce Melissa
10 Brown and Jim Mine from Calpine Corporation. Melissa Brown
11 is treasurer and senior vice president of strategy and
12 financial analyses, as well as Jim Mine, who is vice
13 president of structuring, who have both been very involved
14 and instrumental in the efforts to bring this settlement
15 agreement to fruition.

16 I would also like just to mention, your
17 Honor, that there is some other business pertaining to
18 Calpine. There may be some people in the courtroom who may
19 have to leave in a couple of hours, I just want to
20 apologize in advance and ask for the court's indulgence in
21 the event that people may have to leave the courtroom for
22 other matters.

23 Let me step back and just ask that if there
24 are other people in the courtroom sitting at counsel's
25 table who will perhaps be presenting something to the court

1 this morning to make their appearances on the record.

2 MR. STABER: Your Honor, My Lady, David
3 Staber of Akin Gump Straus Hauer and Feld, counsel to the
4 unsecured creditors' committee.

5 MR. KAPLAN: Gary Kaplan from Fried, Frank,
6 Harris, Shriver and Jacobson here on behalf of the official
7 equity committee.

8 MS. MCCOLM: Good afternoon, Elizabeth
9 McColm from Paul, Weiss, Rifkind, Wharton and Garrison on
10 behalf of the second lien committee.

11 MR. ECKSTEIN: Good afternoon, your Honor,
12 My Lady, Kenneth Eckstein of Kramer Levin representing the
13 ad hoc committee of CCRC creditors.

14 MR. ANKER: Good afternoon, Judge Lifland
15 and My Lady. Philip Anker and James Millar of WilmerHale,
16 and Brendan O'Neill of Goodmans, counsel appearing today in
17 New York on behalf of the Canadian debtors.

18 MR. CASHER: Good afternoon, your Honor and
19 My Lady. Richard Casher of Kasowitz, Benson, Torres and
20 Friedman on behalf of the ad hoc committee of ULC1 note
21 holders.

22 MR. CASTELLO: Good afternoon your Honor
23 and My Lady, Geoffrey Castello of Kelley Drye and Warren
24 for the ULC1 indentured trustee, HSBC.

25 MR. FREDERICKS: Good afternoon, your

1 Honor, My Lady. Ian Fredericks of Young Conaway Stargatt
2 and Taylor, US counsel to Manufacturers and Traders Trust
3 Company in its role as indentured trustee.

4 JUDGE LIFLAND: Hopefully you people will
5 keep all your interventions as briefly as that.

6 MR. SELIGMAN: Your Honor, moving to the
7 substance of the presentations this morning, your Honor a
8 lot of the detailed background has been laid out in a
9 variety of paper before your Honor and before My Lady. So
10 I will briefly summarize the settlement motion and a little
11 bit of background for the benefit of the court and the
12 various people in the courtroom this morning.

13 I think what I want to talk about today,
14 your Honor, are some of the key issues that the US debtors
15 and the Canadian debtors, at least from our perspective,
16 are struggling with since the conception of these
17 insolvency cases, how they attempted to reconcile or
18 address those issues, how they ultimately resolved those
19 issues, and how, from at least the US debtors' perspective,
20 and I'm sure the Canadian debtors would agree, how the
21 ultimate resolution is in the best interest of the estates,
22 their creditors, and the variety of stakeholders who have
23 played significant roles in these proceedings.

24 This case truly has some unique and
25 interesting aspects to them. If we go back to December

1 20th, 2005 the date that the US debtors filed their Chapter
2 11 petitions and the date that the CCAA applicants and CCAA
3 parties commenced the proceedings in Calgary, you have a
4 recently unique situation where you have, on the one side
5 of the border, the US debtors which are in the process of
6 reorganizing with significant assets. At the same time you
7 have a number of Canadian subsidiaries that were in some
8 senses operating but in some senses already not operating,
9 but they also had, relative to their size, significant
10 assets, mostly in the form of intangibles.

11 Stepping back even further, prior to toe
12 time of filing Calpine Corporation viewed itself as a
13 whole. So a lot of times there were joint bank accounts,
14 there were employees, professionals, et cetera, who viewed
15 the company as a whole and conducted a lot of business from
16 the perspective of the company as a whole. And this is
17 important, your Honor, because a lot of the work that has
18 been done since the petition date has been to try to
19 understand a lot of the intercompany accounting and
20 intercompany reconciliations that were ultimately resolved
21 and set forth in the settlement agreement. You also have a
22 unique situation where you have most, not necessarily all,
23 but most of the creditors of the Canadian debtors also
24 having guarantees from Calpine Corporation.

25 So after the initial filing on December

1 20th, 2005, there was a period of stabilization of
2 operations provided -- that were improved upon by the
3 automatic stay here in the US proceeding and by the stay in
4 the initial order in the Canadian proceedings, but soon
5 thereafter the companies -- both sets of debtors began
6 struggling with a variety of issues. We lay them out in
7 the papers. I just wanted to highlight five issues, a very
8 big issues for your Honor, because those are the critical
9 big points that we see from our perspective.

10 Number one, ULC hybrid note structure.
11 This was approximately 2 billion dollars of debt financing
12 raised through the Canadian debtors, we've called the ULC1
13 bond debt, where there were approximately 12 billion
14 dollars or more of claims filed against the US debtors by
15 their bond holders, the trustee, the indentured trustee for
16 the Canadian debtors. There was a significant issue about
17 how the US debtors were going to obtain clarity so that
18 they could move forward with their plan of reorganization.
19 How were they going to address all of the variety of issues
20 that came to light as a result of this complex, hybrid
21 financing. How would the claims objection be handed?
22 Would they be handled in this or the court, or how would
23 the claims that were alleged against the Canadian debtors
24 be handled, and what kind of joint proceeding, if any,
25 could there be. That you issue number one.

1 Issue number two were the 360 million
2 dollars approximately of ULC bonds that have been
3 repurchased by the US debtors, and in a variety of
4 transactions ended up in the name of the Canadian debtors
5 prepetition. The Canadian debtors wanted to sell those
6 bonds, and it's been the subject of a number of proceedings
7 and motion practice before the Canadian court, to maximize
8 value to their estate.

9 The US debtors had a number of issues with
10 respect to the bond sale, principally they had concerns
11 that that bond sale may be avoidable and subject to a
12 502(d) defense or another avoidance action under 550. That
13 presented a variety of issues, not only on the substance
14 but also an on procedure. How would those claims be
15 handled? Would they be viewed as assets to be in handled
16 in front of the Canadian court, or would they be viewed as
17 claims objections to be handled in the US court? That was
18 an issue that was very important to be reconciled, and the
19 parties tried to work in a way to maximize value to both.

20 The third issue is the Greenfield project
21 facility, which this court I'm sure is familiar with having
22 approved a variety of motions with respect to the
23 Greenfield facility. That is a very significant project
24 for the US debtors. It's over a thousand megawatts, one of
25 the biggest megawatt power facilities that the US debtors

1 have.

2 There were a number of issues associated
3 with Greenfield. Number one, there was a small piece of
4 the ownership interest held by the Canadian debtors.

5 Number two, there was an avoidance action
6 commenced by the Canadian debtors against some non debtor
7 subsidiaries of the US debtors alleging that a transfer of
8 a portion of that interest prepetition was also an
9 avoidable action in the Canadian court.

10 Third, this wasn't simply an action that
11 could languish for a period of time because the project was
12 in the process of every couple of months needing equity
13 contributions both from the US debtors and their joint
14 venturer, Mitsui.

15 Every time that an equity contribution was
16 due, there was the issue of could Mitsui exercise certain
17 of its buyout rights to buy out the United States debtors'
18 interest at a discount. So that was an extra issue that we
19 were facing that took a great issue of timing.

20 And finally, your Honor, there was the
21 issue of at some point the project could not survive an
22 equity contributions alone but needed third party
23 financing, and who could we get as a lender to come in and
24 loan money to this facility with all the cloud of the
25 litigation, the partial interest held by the Canadian

1 debtors, and how could we resolve that in a way to maximize
2 value, unlock the project, and let it be financed.

3 Next, your Honor, was the issue of
4 literally hundreds of millions, if not billions of
5 intercompany claims between the two estates. As I
6 mentioned earlier, prior to the petition date Calpine was
7 viewed as a whole and the accounting record were not
8 necessarily the best. There needed to be a lot of work
9 done to reconcile down to the penny a lot of these
10 intercompany claims. People had to look back to original
11 wire transfers and other documentation to recreate the
12 books and to establish who made transfers to whom.

13 And as a result of that there was over a
14 billion dollars of claims asserted by the Canadian debtors
15 against the US debtors, and I believe over 200 million
16 dollars of claims asserted by the US debtors against the
17 Canadian debtors, and they couldn't be offset, because it
18 was against a different debtor correspondingly. So that
19 was another issue that had to be resolve.

20 And finally, your Honor, there was the
21 issue of what I will refer to as the guaranteed claims,
22 which are the claims asserted against the Canadian debtors,
23 they are also guaranteed by the US debtors. Principally
24 amongst these I put in this category; the ULC2 bonds, which
25 was originally about a 550 million dollars or so issuance

1 of bonds. The third party bonds are now at about 350
2 million. That was a claim asserted against the Canadian
3 debtors but also guaranteed by the US debtors, as well as
4 there were also a number of trade claims, a number of
5 contracted pipeline rejection claims asserted against the
6 Canadian debtors that were also guaranteed by the US
7 debtors.

8 The parties faced a difficult dilemma of
9 how do we resolve those claims. There could be the
10 Canadian court that would adjudicate the primary claims,
11 but then how we would deal with the guaranteed claim that
12 would be asserted against the US debtors? There is
13 different rules in each jurisdiction about who has rights
14 and standing to participate in claims objections.

15 So faced with these five primary issues, as
16 well as a variety of other issues set forth and resolved in
17 the settlement agreement, the parties started working very
18 diligently as far back as around Thanksgiving of last year
19 to try and see if we could move the process forward,
20 resolve these issues, and, as we sometimes refer, unlock
21 the estates and let them go on their merry way.

22 And the statement today is a product of
23 approximately seven months of intense, hard work to unlock
24 the estates. And it was simultaneously conducted with
25 negotiations between the US debtors and the ULC1 ad hoc

1 committee of bond holders to try and resolve their issues
2 about the ULC1 hybrid note. And it wasn't just the debtors
3 talking, both sets of debtors talked to their various stake
4 holders to try to get input from their various stake
5 holders.

6 I had a lot of meetings with them and their
7 creditors over the course of time. I can certainly speak
8 from the US debtors' perspective, we had our official
9 committees and our unofficial committee in the loop
10 constantly as we were going through the process. And in
11 addition there was the role of the court appointed monitor,
12 Ernst and Young, who participated in a variety of these
13 meetings to get something done.

14 So, your Honor, eventually we reached
15 settlement on the global resolution that we were presenting
16 to your Honor today. And it resolves virtually all issue
17 between the two estates. And to the extent it doesn't
18 resolve an issue, it creates a process for resolution of an
19 issues. So we really do believe that it provides maximum
20 value both substantively and from a process perspective for
21 both the estates.

22 And I was going to highlight, your Honor,
23 just for a moment, a couple of the benefits of the
24 settlement agreement. But I did just want to mention to
25 your Honor that this settlement agreement was the result of

1 months of back and forth, if you will, horse trading.

2 There were a lot of different pieces. There was some give
3 and take on one issue and give and take on another issue.

4 It should be viewed as a collective whole.
5 We refer to in our motion that this is somewhat akin to a
6 jigsaw puzzle, and if you take out one piece it's not a
7 compete picture anymore. And that's very important,
8 because some of the people here today may suggest that one
9 issue should be tweaked or a that issue should be tweaked,
10 when in reality it was a comprehensive whole, and if you
11 change one piece you've to got to change the whole
12 settlement agreement.

13 So what were the primary benefits for those
14 five major issues that we were talking about? Well, as to
15 the ULC hybrid note issues, we resolved the issue by
16 basically allowing a claim by the ULC1 bond holders in the
17 amount of nominally of 3 and a half billion dollars, with
18 the understanding that they could never collect more than
19 principal, pre and post petition accrued interest, plus
20 some fees and expenses. This reduced the claims register
21 from 12 billion down to three and a half, but in our
22 modeling purposes we could use, as we set forth in the
23 settlement agreement, approximately 2.3; so approximately a
24 10 billion dollar reduction in the claims register, and
25 absolute clarity on this issue from our perspective of

1 allowing us, among other things, to move forward with the
2 plan of reorganization process. And we filed a plan that
3 may not have been able to be filed with this issue if we
4 didn't have some clarity on this issue.

5 Secondly, we have issue of the repurchase
6 bonds. There's been an agreement to let the Canadian
7 debtors sell those bonds in the open market and fund
8 distributions on account of claim in the Canadian
9 proceedings.

10 As part of that, and this is number 3, the
11 US debtors are resolving all of their various objections
12 and avoidance action claims that they would have against
13 the Canadian debtors in return for a 75 million dollar cash
14 payment from the bond sale proceeds. And, your Honor, this
15 is important, because from our perspective we don't just
16 view this as a claim like every other Canadian creditor may
17 have. There are rights as to these bonds, in our opinion
18 we felt were as to a race, as to an escrow, so we had
19 really superior structural priority rights that are being
20 settled by the 75 million dollars.

21 We also, as we originally set forth in our
22 502(d) claim objection, we had rights as to the Salten
23 proceeds, which were about 230 million dollars of money
24 repatriated up through the Canadian process sitting at
25 CCRC, which is one of the Canadian debtors.

1 The US debtors and the Canadian debtors had
2 agreed a long time ago that to the extent the US debtors
3 had any claims with respect to any of the proceeds of those
4 claims, and we believe that our avoidance action was
5 against one of those claims, that we would have structural
6 priority that would be senior to any of the creditors of
7 CCRC so that in a sense we would get paid first.

8 Number 4, as to Greenfield. The Greenfield
9 issue is resolved. There is going to be a withdrawal of
10 the avoidance action against the US debtors and their
11 subsidiaries with respect to that; that will allow us to
12 fully move forward with the facility unencumbered by any of
13 the clouds that were existing before.

14 Number 5, all of the intercompany claims
15 have been fixed and resolved. There is a schedule attached
16 to the motion and the settlement agreement which lays out
17 in detail all the various claims back and forth that are
18 going to be allowed and how they are going to be allowed,
19 so that issue is resolved.

20 And finally there is a process in place to
21 resolve the so called guaranteed claims. We have agreed
22 with respect to those guarantee claims that are going to be
23 adjudicate, that they will be adjudicated in front of the
24 Canadian courts, and that the US debtors and their official
25 committees will have the opportunity to have standing and

1 to participate in that litigation. That gave us and our
2 committees comfort that we could litigate that issue in
3 Canada and not revisit the issue in this court.

4 In addition, with respect to the ULC2
5 bonds, as laid out in the pleadings, we have agreed that
6 there's enough money and that they should be paid in full.
7 There is some disagreement as to the exact amounts that are
8 owed, but we've agreed to reserve some money set aside, to
9 the extent that we can't pay what they say they are owed,
10 and we will litigate those issues letter.

11 One issue that may come up, perhaps, are
12 the ULC2's argument for make whole, and we have both agreed
13 that that would be an issued to be dealt with by this
14 court, given that it's an indenture governed by New York
15 law, and given the state of the law in the US as far as
16 make wholes and given your Honor's recent experience in
17 this case regarding make wholes.

18 So we think that from the US debtors'
19 perspective, it solves all of the major issues that we were
20 grappling with, from our perspective it brings a
21 significant amount of cash into the estate, assuming that
22 all the Canadian creditors get paid in full, there will
23 also be, perhaps, a significant return on equity to the US
24 estate, which is additional funding money, there is the
25 Greenfield issue resolved, there is the claims pool being

1 reduced by billions of dollars, and there is the unlocking
2 of the estates and allowing the process to move forward.

3 Your Honor, let me pause here for a second,
4 and I was going to move to just process for a second in
5 terms of how we talk to our stakeholders about the
6 settlement, but I wanted to pause here and just ask your
7 Honor, we do have Mr. Johnston here who would be prepared
8 to testify as to the benefits of the settlement and a
9 little bit of the background of the settlement.

10 We have a proffer that we would be willing
11 to put on for your Honor that would take 15 minutes to
12 read. If your Honor would like, we are happy to go forward
13 and introduce that proffer. If your Honor feels that based
14 upon the record before you that that would be duplicative
15 of the presentation this morning, we can move on.

16 JUDGE LIFLAND: Frankly I think it would be
17 duplicative. I've got about two feet of papers in front of
18 me, and I've had about 48 or more hours to plow through
19 them. It might be redundant, unless somebody wants to have
20 the proffer and go through that exercise. I do not find it
21 necessary.

22 MR. SELIGMAN: Thank you, your Honor. We
23 just wanted to give your Honor the opportunity.

24 With that, let me just briefly mention that
25 as far as dialogue with our committees, and I think that

1 you'll hear the same thing from the Canadian debtors, there
2 was a process in place to keep our committees at least
3 updated on this process as it was developing and as we were
4 having negotiations with the Canadian debtors. And even
5 before, well in advance of filing of motion, we spoke to
6 our various stakeholders to have them comfortable with what
7 was going on.

8 One of the things between Alix Partners and
9 the monitor was what we called a distribution model, which
10 kind of laid out how we thought the funds would ultimately
11 flow, and that was one of the things we used to talk to our
12 creditors and stakeholders about the process.

13 Just to remind your Honor of some of the
14 dates here. The term sheet between the US debtors and
15 Canadian debtors was signed May 13, and May 17 a press
16 release.

17 MR. ANKER: AK was filed with respect to
18 the term sheet, so that was the first opportunity that
19 people were on notice publically about this settlement. It
20 wasn't until over a month later that the motion was filed,
21 during which time we were talking to all of our various
22 stakeholders; with the motion we attached a draft form of
23 the settlement agreement.

24 As set forth in the motion, we would file
25 and did file by July 9th, a final version of that global

1 settlement agreement. That was not only published in
2 various newspapers across North America, it was also served
3 on all of the bond holders for the ULC1 holders, it was
4 also put on the depository trust lens system, and it was
5 also put on the Calpine Corporation Chapter 11 website.
6 And again, during this entire process there were continuing
7 discussions going on.

8 Over the past several weeks there has been
9 continuing dialogue, and there has been some minor
10 modifications agreed to between the debtors and their US
11 constituents with respect to the implementation of the
12 settlement agreement. And just as housekeeping matter I
13 just want to identify those briefly for your Honor, and
14 this is reflected in a black line and settlement agreement
15 and proposed order that was signed on Friday to put
16 everyone on notice as to what those changes are.

17 These changes were, just the big picture,
18 were essentially to ensure that as the US debtors were
19 implementing a settlement agreement on their side of the
20 border, that they were going to be constantly keeping their
21 committees and the official and unofficial committees in
22 the loop as to the process. And to the extent that they
23 were going to be needing to give consent on various issues
24 or sign-off on various issues, that they could talk with
25 the committee's before doing so.

1 And so essentially we've agreed in general
2 to consult with the committees, and when I say committees,
3 I'm talking about the equity committee, the creditors'
4 committee, and the ad hoc committee of second lien holders.
5 The debtors have agreed to generally consult with the
6 committees on matters related to the implementation of the
7 settlement agreement, whenever the US debtors have to
8 consent or give approval on any issues, the US debtors have
9 agreed to give notice to the committees and to provide
10 relevant documentation to the committees.

11 With respect to any settlement of the
12 guaranteed claims that we spoke about before, the US
13 debtors have agreed to gave reasonable notice to the
14 committees and an opportunity to comment on any such
15 settlement. And to the extent that the committees believe
16 that it's inappropriate they can object, and then we can
17 come before your Honor to determine whether that particular
18 settlement, from only in the US debtors' perspective, would
19 be in or not in the debtors' reasonable business judgment.

20 We have also agreed with the ad hoc
21 committee that certain transfers of property under the
22 settlement agreement would not be made unless there was a
23 context of a confirmed plan of reorganization. We have
24 also confirmed with the ad hoc committee that this
25 transaction will not effect whatever lien rights they have

1 against the US debtors. And finally, because the ad hoc
2 committee is not a participant in the guaranteed claims
3 litigation, that we would basically continue to talk to
4 them and provide them with relevant documentation as we are
5 going through that process.

6 As a housekeeping matter, we just also
7 recently agreement with the committees on an additional
8 point about implementation of the settlement, and I just
9 want to read this into the record for your Honor. If
10 you'll bear with me, it will take about a minute.

11 The debtors would like to make a clarifying
12 statement for the record with respect to the proposed
13 settlement that reflects an understanding between the US
14 debtors, the creditors' committee the equity committee, and
15 the ad hoc committee of second lien holders. As your Honor
16 may recall, last year the Canadian debtors decided to
17 repatriate the proceeds from the sale of the Salten Energy
18 Center in the UK which resided in a bank account of a UK
19 subsidiary of CCRC, one of the Canadian debtors.

20 The repatriation required the proceeds to
21 flow through entities in Luxembourg, the Channel Islands
22 and the UK to ensure that intercompany obligations were
23 paid off along the way. At the time the Canadian and US
24 debtors cooperated in establishing a plan to structure the
25 repatriation of the fund in such a way to honor the

1 original transaction thereby avoiding the incurrence of
2 additional taxes not originally contemplated. This
3 repatriation plan was successfully executed and the Salten
4 proceeds now reside at CCRC and will be able to be used to
5 fund distribution to the Canadian debtors' creditors to
6 creditors as contemplated in the settlement before the
7 court this afternoon.

8 The Canadian global settlement presents
9 similar issues. The flow of funds in the global settlement
10 will travel through several entities paying off
11 intercompany obligations along the way. The most
12 significant among these is Calpine Corporations'
13 satisfaction of the claims of the bond holders through the
14 ULC1 hybrid note structure described in the motion.

15 This fund should flow well, among other
16 things, be structured to minimize any negative tax
17 consequences to the CCAA and US estates and to assure
18 compliance with US and Canadian tax laws. Your Honor, as
19 you will note in section 2.6 of the settlement agreement
20 obligates the parties to use commercially reasonable
21 efforts to cooperatively implement, perform, and execute
22 the terms of the agreement in a manner that is mutually
23 beneficial for both the US debtors and Canadian debtors,
24 while retaining the same economic benefits of the
25 agreement.

1 Your Honor, the US debtors have been
2 working with their tax advisors to develop a structuring
3 plan for implementing a settlement agreement, particularly
4 the satisfaction of the ULC1 obligations throughout the
5 hybrid note structure that will honor Section 2.6 of the
6 settlement agreement; and the final version of that
7 structure was shared with the official committees and the
8 ad hoc committees on July 23rd. The US debtors intend to
9 implement that settlement agreement substantially in
10 accordance with the structuring plan; however, any
11 implementation actions are proposed to be taken under this
12 agreement by any party that deviates materially from this
13 July 23rd structuring plan.

14 The US debtors have agreed to provide ten
15 business days prior written notice of any such proposed
16 action to the official committees and the ad hoc committee
17 of second lien holders, and shall consult with those three
18 committees regarding such actions. If any of those three
19 committees object to such proposed actions by the US
20 debtors by providing written notification of such objection
21 within ten business days from the date of the US debtors'
22 providing written notice of such actions, then the US
23 debtors have agreed to seek a determination from this
24 court, that is the US court, on an expedited basis that
25 such proposed actions by the US debtors are the product of

1 reasonable exercise of the US debtors business judgment,
2 provided, however, that this expedited process will provide
3 all parties in interest, including each of the three
4 committees, with an opportunity to object to the proposed
5 modifications to the structuring plan.

6 Your Honor, I apologize to the length of
7 that, but that was agreed upon language with respect to the
8 three committees.

9 Your Honor, in conclusion, for all the
10 reasons that we've set forth in the motion, and based on
11 the presentation this morning, we believe that at least
12 from the US debtors' perspective, the settlement is in the
13 best interest of the creditors, a sound exercise of the
14 debtors' business judgment, clearly confers a substantial
15 benefit on all concerned and should be approved.

16 With that, your Honor, unless your Honor
17 has any questions, I would propose to turn it over to those
18 individuals who wish to makes a statement or in support or
19 a statement of non opposition to the motion, at which time
20 we would turn it over to the Canadian court.

21 JUDGE LIFLAND: We'll turn it over to the
22 Canadian court.

23 MR. SELIGMAN: Should we hear statements in
24 support, or do you want us to --

25 JUDGE LIFLAND: Well, that's in violation

1 of your proposed order of presentation, but on an ad hoc
2 basis it does make a lot of sense to hear your supporters
3 at the same time.

4 MR. SELIGMAN: Thank you, your Honor.

5 JUDGE LIFLAND: Go ahead.

6 MR. STABER: Your Honor and My Lady, David
7 Staber on behalf of the official committee of unsecured
8 creditors of Calpine Corp. and its jointly administered US
9 debtors.

10 Your Honor, recognizing the number of
11 parties appearing here and your admonition, I have deleted
12 by a third my comments, as brief as they were.

13 Early in this case the creditors' committee
14 was very concerned that the cross-border issues between the
15 US and Canada, particularly the hybrid note structure
16 impediment to confirmation, we became involved early in the
17 process, hiring Canadian counsel, studying the underlying
18 documents, and working with the US debtors on these issues.
19 Based on that background and our conversations with the
20 debtor, we believe that the settlement is reasonable and
21 appropriate and will help the parties move forward to
22 completion for reorganization in these cases.

23 And with that, your Honor, and my promise
24 to be brief, I'll be seated.

25 JUDGE LIFLAND: Thank you.

1 MR. KAPLAN: Your Honor and My Lady, Gary
2 Kaplan from Fried Frank.

3 Your Honor, the equity it committee filed a
4 brief statement in support of the debtors' motion. I too
5 will be extraordinarily brief. For all the reasons that
6 the debtors laid out in their motion papers and for the
7 reasons that Mr. Seligman discussed on the record today,
8 the equity committee is supportive of the settlement.

9 One other thing I would be remiss if I
10 didn't say, I've often been very critical, your Honor, of
11 the debtors. On this issue I do have to give credit to the
12 debtors that they have been very good at keeping their
13 constituents in the loop throughout, and we are very happy.
14 Obviously we are supportive of the settlement, and we also
15 appreciate the process that was run to get to this
16 settlement.

17 MS. MCCOLM: Your Honor and My Lady,
18 Elizabeth McColm from Paul, Weiss, Rifkind, Wharton and
19 Garrison on behalf of the second lien committee to Calpine
20 Corporation.

21 Your Honor, similar to the official
22 committee of unsecured creditors and the equity committee,
23 the debtors have kept the second lien committee in the loop
24 over the past few months throughout the negotiation
25 process, and we are grateful to the debtors for that.

1 Your Honor, it's suffice to say that the
2 second lien committee believes that the settlement
3 presented here today is in the best interest the US
4 debtors' estates and should be approved.

5 JUDGE LIFLAND: Does anyone else want to be
6 heard in support of?

7 MR. ANKER: Your Honor and My Lady, Philip
8 Anker, US counsel for the Canadian debtors. Your will
9 obviously hear and My Lady will hear much more from the
10 counsel for the Canadian debtors in Canada. But I did want
11 to give one minute of a US perspective.

12 As I heard Mr. Seligman, I agreed with so
13 much of what he said, and I yet I disagreed with a little,
14 and what I disagreed about I think is significant. As he
15 was describing if there had been litigation what the US's
16 position would have been, I kept saying to myself, no, we
17 would have argued this, no, we would have argued that.

18 It would have been an extraordinarily
19 complicated and involved process. There would have been,
20 as Mr. Seligman noted, major issues of jurisdiction, which
21 court should decide what. There would have been, had the
22 avoidance claims been brought, all sorts of issues about
23 were the transfers, by way of example, made from one US
24 debtor to another? Does an action have to be brought by
25 one US debtor against another as a predicate? Would

1 separate counsel be needed? Can you avoid that through
2 substantive consolidation? What issues would have that
3 raised about whether substantive consolidation would or
4 would not have been appropriate?

5 I think, one thing that everyone in this
6 courtroom can agree upon is that that litigation would have
7 taken enormous time. I would have been hopefully that I
8 could have persuaded your Honor, if your Honor were to
9 decide the issues as a matter of law that we would have
10 been right on some issues, but I'm smart enough and I've
11 been around the block long enough to know that there would
12 have been issues that would have required discovery and a
13 long complicated process. And at the end, while that might
14 have personally benefited me and my law firm and benefited
15 other professionals, who would it would not have benefited
16 are the creditors of these two estates.

17 This process in the US, and from what I'm
18 the told about the process in Canada, is, at its core,
19 designed to maximize recoveries and lead to a fair and
20 equitable distribution to creditors, and that is what this
21 will do. Your Honor is well aware of what the US debtors'
22 projections are and their plans for the recoveries. The
23 Canadian debtors believe that this will lead to payment in
24 full to the vast majority of their creditors.

25 This is, certainly from a US perspective, I

1 think a remarkable accomplishment, and I certainly can
2 second and verify Mr. Seligman's comments that this
3 required extraordinary numbers of meetings and hard work of
4 a lot of professionals, and he's absolutely right when he
5 says it's a jigsaw us puzzle. There was give and take an
6 every element here.

7 So from a US perspective, the Canadian
8 debtors support the motion of the US debtors here.

9 JUDGE LIFLAND: Thank you for those very
10 brief remarks, counselor. But you also remind me that
11 you've appeared before me, and some of the same colloquy
12 took place and it became the bully pulpit for me to
13 admonish everybody about the need to enter into protocols
14 so that we can get to a day like today, where all of those
15 very complex issues could be viewed in a different light
16 and a different perspective, with coordination and
17 cooperation being the watch word which turned out to be --
18 well, I can't prejudge the hearing today, but it does
19 appear that the parties have, at least those who are in
20 support of the settlement, have come together as a unit.

21 MR. CASHER: Your Honor and My Lady Richard
22 Casher of Kasowitz Benson for the ad hoc committee of ULC1
23 note holders.

24 Just by way of a quick status report, we
25 obviously filed very lengthy papers in support of the

1 motion today, your Honor. Our group, which had directed --
2 issued a written direction to the ULC1 indentured trustee,
3 consists of 12 note holders. We've been negotiating with
4 HSBC over their objection. We believe we've reached
5 agreement with HSBC concerning their objection, which
6 essentially has resulted in a revised form of a direction
7 and indemnity letter having been agreed upon.

8 We are waiting for final sign-off by one of
9 the 12 note holders, and we expect hopefully to receive
10 that shortly. And when we do so, we will report that to
11 both courts.

12 JUDGE LIFLAND: Thank you, sir.

13 MR. SELIGMAN: Your Honor, I just wanted to
14 note on that. Obviously the US of debtors need to see the
15 language, but hopefully we can resolve that issue.

16 And with that, your Honor, the US debtors
17 have completed their submissions. And unless your Honor
18 has questions, we would request that you turn it over to
19 the Canadian court.

20 JUDGE LIFLAND: I'm sure My Lady is
21 anxiously awaiting to hear from our constituency.

22 JUSTICE ROMAINE: Anxious but patiently,
23 Judge Lifland. So we will now turn things over to you, Mr.
24 Robinson, to make the opening statement and presentation on
25 behalf of the Canadian debtors.

1 MR. ROBINSON: Thank you, My Lady and your
2 Honor. For the record, Larry B. Robinson of McCarthy
3 Tetrault co-counsel for the Canadian debtors.

4 Following Mr. Seligman's lead, given the
5 significance of this application from Canadian debtors'
6 review, I would like to take a moment to make some
7 introductions with respect to the Canadian team that are in
8 court today, starting with Mr. Tobey Austin.

9 Mr. Austin is the director of the Canadian
10 debtors who has met the charge. He is the client that we
11 often forget about that we have reported to and has been
12 instrumental in the structure of this transaction for us.
13 With me from McCarthy Tetrault, my partner, Sean Collins.

14 The settlement agreement was put together
15 between Mr. Austin and the Goodman team, our co-counsel
16 lead by Mr. Carfagnini, who is at the table with me, and
17 Mr. Meyers, Fred Meyers of Goodman's, who will be making
18 the application on behalf of the Canadian applicants, Mr.
19 Brian Empey is in the courtroom, Mr. Joseph Pasquariello is
20 in the courtroom, Brendan O'Neil, another member of that
21 team of Goodmans is in the New York courtroom already.

22 This deal could not have come together
23 without the assistance of the monitor's staff, Mr. Narfason
24 and Mr. Fun, who are in the courtroom. They, working with
25 Alix Partners, who I know were of great assistance to the

1 US debtors, were very instrumental in bringing us to today
2 hopefully through today. Their counsel, Pat McCarthy and
3 Josef Kruger are in the courtroom as well. In addition,
4 and not the least is Mr. Jay Swartz from Davies Ward
5 Phillips and Vineberg who represents Lehman Brothers, who
6 had a key role to play in the bond sale, presumably debt,
7 to that point.

8 We concur with the order of proceedings as
9 set up earlier with the introductions. And the with these
10 additions on our side, I will turn over to other parties in
11 courtroom to introduce themselves. I don't know if they
12 wish to mention numbers of their teams, but there are a
13 number of parties here speaking for and against.

14 And following those introductions, Mr.
15 Meyers will make the application on behalf of the Canadian
16 debtors.

17 JUSTICE ROMAINE: Thank you.

18 Mr. Thornton, do you wish to lead the
19 charge on the opposition introductions?

20 MR. THORNTON: Thornton, initial R, counsel
21 for the informal CCRC committee, and assisted here today by
22 Mr. Finnigan and Ms. Moncur.

23 JUSTICE ROMAINE: Mr. Dunphy?

24 MR. DUNPHY: Thank you, My Lady. Sean
25 Dunphy here for the ULC trustee. Ms. Pillon is with us as

1 well, and I guess we'll save our comments for when it's
2 time.

3 JUSTICE ROMAINE: Thank you. Mr. Linder?

4 MR. LINDER: My Lady, Peter Linder on
5 behalf of Calpine Power Limited Partnership, along with my
6 colleague, Emi Bossio, and we will have some comments in
7 response.

8 JUSTICE ROMAINE: Yes, thank you. Mr.
9 Gorman and Mr. Smith?

10 MR. GORMAN: My Lady and your Honor, Howard
11 Gorman on behalf of the ULC ad hoc committee, and we will
12 be speaking in support of the application in due course.

13 JUSTICE ROMAINE: Thank you.

14 MR. SMITH: My Lady and your Honor, Quincy
15 Smith on behalf of Alliance Pipeline.

16 JUSTICE ROMAINE: Thank you.

17 MR. McCLAIN: My Lady, Douglas McClain for
18 the TransCanada Pipeline. Also with me is David Elrod from
19 the Elrod Trial Attorney firm in Dallas.

20 JUSTICE ROMAINE: Thank you.

21 MR. GRIFFIN: My Lady, your Honor, Peter
22 Griffin for the US debtors.

23 JUSTICE ROMAINE: Thank you, Mr. Griffin.

24 MR. LANCE: Nathan Lance Canadian counsel
25 for the ULC1 indentured trustee.

1 JUSTICE ROMAINE: Okay. Thank you.

2 Do we have everyone introduced?

3 Thank you then. Mr. Meyers?

4 MR. MEYERS: Thank you, My Lady. Good
5 afternoon your Honor. My name is Fred Meyers, counsel for
6 the Canadian Calpine debtors, and I rise today on behalf of
7 the Canadian debtors seeking orders of this court approving
8 and authorizing the Canadian debtors to enter into the
9 global settlement agreement approving the sale by CCRC of
10 its ULC1 notes, and also not to be forgotten, seeking
11 extension of these proceeding.

12 I want to start off very briefly dealing
13 with the sale of the ULC1 notes. That motion is an
14 integral component of the global settlement agreement and
15 is part of the value maximizing process that has been
16 created to fit the nature of the market for those
17 particular assets.

18 JUSTICE ROMAINE: Mr. Meyers, can I stop
19 you just for a moment?

20 We have the sound turned very loudly in
21 order to hear the US side. Could I just ask, Madam Clerk,
22 that we turn it down just a little bit, and when we need to
23 we'll turn it back up, that might make it a little better
24 here.

25 Go ahead, Mr. Meyers.

1 MR. MEYERS: The process that we have
2 proposed for the sale of the ULC1 notes is actually quite
3 complex and it occupies a fair amount of material,
4 including seeking a sealing order for the supplemental
5 affidavit of Mr. Sholvat from Lehman Brothers. That
6 affidavit discloses pricing issues that need to be sealed
7 in order to protect the integrity of the value maximizing
8 process.

9 Out of all the briefs that we have
10 received, there has not been any opposition, that we've
11 seen, with respect to the bond sale aspect of the motion.
12 So I don't propose to spend any time on it, My Lady, except
13 to note that it's a key element to the global settlement,
14 designed to bring in sufficient funds to see to the payment
15 of all of the Canadian creditors as best as possible.

16 In our bench brief, that is perhaps too
17 long to be called a brief, we've summarized the benefits of
18 the global settlement agreement, and I'm going to try to
19 follow that section roughly. The bench brief is in the
20 first volume of the binders behind Tab 3 -- Tab 2, excuse
21 me, and I'm going to start at paragraph 20.

22 The first benefit that has been identified
23 by the Canadian debtors from the global settlement
24 agreement is the reduction in claims against the Canadian
25 estates, something in the order of 7.4 billion dollars in

1 claims against the Canadian debtors are gone, because other
2 claims from those same creditors are going to be paid in
3 full. ULC1 note claims, for example, are simply moved out
4 of the estate into the United States. Of the 21.7 billion
5 dollars of claims identified by the monitor in its 23rd
6 report, it look like all are going to be paid in full, with
7 a possible exception of 25 thousand dollars at CCEL, and
8 that's a matter that we are working on as part of the
9 future structuring. And it's really an incredible outcome.
10 It's certainly a long way from where this case began.

11 The monitor has identified the possibility
12 of another 25 million dollars of potential creditor
13 shortfall at the CESCA subsidiary, and those are claims
14 that are not guaranteed by the US debtors, that are held
15 principal by the pipe lines, TransCanada Pipeline, Limited,
16 CCEL, and Alliance. Those are the creditors who are most
17 on the bubble or on the cusp of the recovery, and who
18 compared the result of the finance anticipated end result.
19 Their counsel is here today to support the deal, or at
20 least not to oppose the global settlement agreement.

21 So even though you hear from others,
22 particularly the fund, who seek to raise the risk of non
23 payment, as is identified in their materials, My Lady
24 should be clear that they are not speaking on behalf of
25 themselves but purporting to speak on behalf of others who

1 do not oppose, and in some cases actively support the
2 settlement. CCEL and Alliance themselves together make up
3 between 23 and 24 million of the 25 million potential
4 shortfall.

5 There are other creditors as well. At
6 CCRC, we tend to only talk about the ULC2 note holders or
7 CESCA. There are direct creditors. West Coast is here
8 with a 66 million dollar claim under CCRC. I understand
9 that they are going to support the deal because they would
10 like to get paid in full under the ULC2 note holders.

11 Equally important, since I don't mean to
12 minimize anyone's role, but there is another party who is
13 integral and whose recommendation will play a heavy weight
14 on or have any weight on My Lady, not a question of the
15 monitor, who is, of course, an independent officer. They
16 have been highly involved, as My Lady has heard and seen in
17 the materials. They worked on the models, the distribution
18 analysis that's so carefully and fully outlined in the 23rd
19 report. The monitor has given a clear and powerful support
20 for the global settlement agreement. Paragraph 3 of its
21 23rd report says, "in fact, these global settlement
22 agreement provides the maximum recovery available to the
23 debtors." Those are strong words from the court monitor
24 and the monitor's recommend is an important element in our
25 request today for approval.

1 By decreasing the claims, we, of course,
2 wanted to maximize realization. Part of the production of
3 claims is a 2 billion dollar claim of CCEL against CCRC
4 that is going to be subordinated by the US debtors. And
5 you'll hear much reference, I suspect, to the US debtors as
6 equity holders, but in fact they have creditor interest as
7 well of their own and subrogated claims. And here we
8 understand that as part of the global settlement agreement,
9 they are going to subordinate those claims. And as the
10 monitor can confirm, no money will go to CCEL by equity
11 holders until all the Canadian creditors and CCRC are paid
12 in full, either in Canada or through their guarantees. And
13 that's confirmed in paragraph 7 of the draft order.

14 The monitor predicts that the US debtors
15 stand to receive between 176 and 369 million dollars on
16 distributions above the 75 million dollar settlement
17 benefit. That's a substantial flow of money to the equity
18 holders due to this transaction, but it means first that
19 the Canadian creditors of CCRC are paid, because that's the
20 provision of the order and of the global settlement
21 agreement, either paid from the claims or paid through the
22 guarantees of the US.

23 The second benefit that we've identified,
24 starting at paragraph 22 of our bench brief, is the
25 maximization of realization. And that's principally, but

1 not completely deals with the sale of CCRC's ULC1 notes.
2 In order to get to the position to sell those notes, we've
3 had to resolve the bond differentiation claims advanced in
4 this court by the US debtors. The US debtors had to remove
5 their objections to the ULC claims under the guarantees.
6 We've been trying, as My Lady knows, for almost a year to
7 get to this point. The CCRC committee says in their brief,
8 they should have been cooperating throughout, but that's
9 what makes lawsuits, parties disagree. And I've heard Mr.
10 Anker and Mr. Seligman talk about potential litigation in
11 the United States; I thought I understood that there were
12 real objections filed and real deposition notices with
13 respect to those objections.

14 At paragraph 26 of our brief, we note that
15 in the March 5th application before this court brought by
16 the CCRC committee, the committee complained that six
17 months had passed since the August 31, 2006 order
18 authorizing and directing the sale of the CCRC ULC1 notes
19 at issue, and yet the notes remained unsold and pointed out
20 that they could not be sold until the US debtors' market
21 claims were adjudicated. And its bench brief for the April
22 4th, 2007 application, the CCRC committee said, it is
23 inerrantly that the CCAA proceedings can proceed to
24 conclusion without the bond differentiation claims, among
25 others, being resolved, unless the bond differentiation

1 claims are resolved, the CCRC ULC1 bonds can not be
2 realized and distributed. The global settlement agreement
3 resolves those claims.

4 The fund then objects while a part of that
5 is releasing a 575 million dollar claims of CCEL up into
6 PCH, an American debtor. But again, in picking one piece
7 "to look at," they ignore the other pieces that the US
8 agreement to subordinate the 2 billion dollar claim back
9 into CCRC. The 180 million dollars of cash that's going to
10 come down in intercompany claims into Canada, the US
11 debtors' agreement to remove their preference claims
12 against the Salten proceeds, removal of the BEC's and US
13 objections to the notes, subrogation of 50 million dollars
14 to CESCA, all aimed at designed to ensure that the Canadian
15 debtors are paid here or in the Unites States.

16 The third principle I want to spend a
17 moment on is the elimination of litigation, which is dealt
18 with in paragraph 37 -- 27 of our brief. Not just the
19 BEC's, the bond differentiation trend litigation, but also
20 it's the Salten proceeds, there were claims being made,
21 those were preferential potentially in the United States,
22 that's over 250 million dollars in cash at CCRC. The
23 hybrid note structure that we heard about, the litigation
24 and the complexity that would have been involved in that
25 claim. The Greenfield litigation. And with respect to the

1 Quintana 575 million dollar claim that's been released, the
2 CCRC committee says why don't you just make them pay it,
3 because you owe 2 billion back, and under the rule ensuring
4 liability, before somebody can get money, they have to pay
5 the money. Well, it doesn't apply to a Nova Scotia limited
6 liability company. And how does Cherry and Bolty apply the
7 partnership claims in the subsidiary, to raise one issue,
8 rises a whole host of litigation issues that have all been
9 resolved.

10 The global settlement agreement is first
11 and foremost a settlement of claims between the US and
12 Canadian estates. And in our submission you can't simply
13 isolate one issues, and even to make another an example to
14 make the facts, is the 75 million dollar settlement that we
15 are the US -- excuse me, 75 million dollar payment that we
16 are making to the US, of course that's a payment that's not
17 priority distribution but rather we understand that in
18 selling the CCRC ULC1 notes free of bond differentiation
19 claims and US objections, there will be an increased
20 recovery through decreased market discounts.

21 In addition, we are settling at least five
22 significant pieces of litigation with the US, and in return
23 we are giving a 75 million dollar charge which will be a
24 charge on the proceeds of the note sale, so it's only going
25 to be paid ones we have a successful note sale, and it will

1 be paid at the same time as the ULC2 notes are paid after
2 the bond sale -- the note sale.

3 The 75 million is, in essence, a net share
4 of the benefit of certainty in all of these matters. You
5 may recall in February when HCP bought the income fund, HCP
6 being the current fund, some creditors complained, at the
7 time, that HCP's offer had effectively declined by the 25
8 million dollars distributed during the bid process, and you
9 were told by the funds counsel that was the price of
10 certainty, because the fund wanted to litigate with us over
11 whether our management agreements could be terminated. And
12 My Lady accepted in your decision that it was reasonable
13 for a debtor to share value to setoff claims to obtain
14 certainty; whether we call the 75 million dollar payment a
15 piece of sharing of the upside of having a clean bond sale,
16 or we call it a net payment of 90 million to the US,
17 offsetting against the 15 million dollar payment on
18 Greenfield, which is in the monitor's finding report, we
19 could call it a 200 million dollar payment to the US and
20 125 million dollar sale of the savings on Greenfield, or
21 offset on Greenfield, it doesn't matters. It's a net 75
22 million dollar payment which is part of a bigger plan that
23 sees money go to the US through equity on the basis that
24 Canadian creditors are paid. And the monitor says that
25 maximizes realization, and we submit its completely

1 correct.

2 Turning then to the last benefit that I'll
3 spend time on, although there are others, is treatment of
4 guaranteed claims, which is dealt with starting at
5 paragraph 34 of our packet. We understand in common law
6 that a guarantor has a right of standing in a claim between
7 a debtor and a creditor. It's clear in the textbooks the
8 creditor sues the debtor, it can sue the guarantor in the
9 same claim, the proper parties. The guarantor has the
10 right to be there and to raise defenses. But the problem
11 in our case is the US debtor has a stake, so our creditors
12 can't come and sue the debtor and the guarantor in the same
13 claim. And under the texts it's equally clear, if you sue
14 the debtor, the debtor sues a creditor and not the
15 guarantor, the guarantor is not bound by the outcome; it
16 prevents collusion between the debtor and the creditor.

17 So we have two claims with the guarantor
18 not being bound by the outcome in the most inefficient and
19 expensive process. And so our creditors face the prospect
20 of having to deal with a trial here, and then a trial in
21 the US. And under the global settlement agreement, the US
22 debtors will acknowledge their guarantees unconditionally,
23 they will admit to the claims, so that all that will be
24 needed is an evaluation hearing.

25 The US debtors also agree that guaranteed

1 claims that could be claims in the US cases against US
2 debtors, will be heard in a unified, single proceeding
3 before this honourable court. We have to give credit where
4 credit is due; after a tussle last April, the US debtors
5 have certainly stepped up with to the mark, with the
6 assistance and perhaps gentle nudges of the courts, which
7 have not been lost on the parties, but as part of the
8 global settlement agreement, we are all recognizing the
9 efficiency of having a single court hearing on the issue of
10 quantum; we don't even need to worry about liability.

11 Now, you may have read in some of the
12 briefs that -- the CCRC committee's briefs, the complaint
13 that they weren't at the table with the US actually
14 drafting the document, and it's true. Mr. Austin, in his
15 cross examination, when the trust was filed?

16 JUSTICE ROMAINE: Yes, it was. Thank you.

17 MR. MEYERS: Mr. Strausser said the
18 settlement was estate to estate, the CCRC and the United
19 States wasn't at the table either, each estate was acting
20 for its stakeholders. How many people can one have at the
21 actual bargaining table before it becomes impractical and
22 nothing gets done. But they weren't fully involved, the
23 ULC1s put in a term sheet that resulted in a deal. Mr.
24 Austin said the ULC2s put in a term sheet for the fund.
25 That didn't resolve the deal, but at the end of the day we

1 ended up getting a the deal that incorporated many of the
2 terms of their term sheet and they are all listed in
3 paragraph -- that's sort of the last paragraph of our reply
4 brief, including among the terms sought by these bagged
5 funds and the ULC2 creditors was in fact the very terms
6 that I'm rely relying on now, the single guarantee in
7 Canada -- hearing in Canada.

8 I was going to turn, My Lady, to a brief
9 which is a submission on the law, I don't know if My Lady
10 feels the need to hear it at this point or it's better
11 saved.

12 JUSTICE ROMAINE: Let's save it and see
13 where we get. Okay.

14 MR. MEYERS: In summary, My Lady, this is
15 an estate to estate settlement, no one is being crammed
16 unilaterally, we are in a joint hearing to bring to
17 fruition months of efforts spurned with the assistance of
18 both courts last April. The ULC1 is going to be paid in
19 full, the ULC2 is going to be paid in full, the fund is
20 going to be paid in full, assets are maximized, enough
21 so -- enough assets are going to be realized so as to allow
22 payments into the US once the Canadian creditors are paid.
23 The creditors at risk support it on their votes.
24 Perfection, of course, is never the test, nor is formal
25 equality. The test is fairness and reasonableness.

1 All of these matters are linked in our
2 submission, but the settlement agreement provides all of
3 the benefits that I've enumerated, unlocks the estates,
4 allows us to move forward. And on that basis we seek
5 approval of the global settlement and bond sale, the
6 threshold amount referred to in the -- by a confidential
7 affidavit which has to be sealed, and of course I'll speak
8 to you later perhaps about an extension.

9 JUSTICE ROMAINE: Thank you, Mr. Meyers.
10 And I should, as a housekeeping matter, tell you that I
11 have not received a copy of the confidential Lehman
12 affidavit as of yet. At an appropriate time --

13 MR. MEYERS: Very shortly.

14 JUSTICE ROMAINE: Okay.

15 Mr. Carfagnini, did you wish to speak? No?

16 Does anyone else wish to speak in favor
17 of the settlement agreement?

18 MR. GORMAN: Yes, My Lady and your Honor.
19 Howard Gorman again on behalf of the ULC1 ad hoc creditor
20 committee.

21 I think it's significant to recall the
22 overwhelming size of the ULC1 claim in Canada. It's in
23 excess of 2.5 billion dollars flowing through the various
24 companies, which, without the guarantee or intercompany
25 claims from the United States, overwhelms the remaining

1 Canadian assets.

2 My Lady, in your, and, your Honor, in your
3 three or four binders or two feet of materials, there is a
4 three page entry of the ULC1 note holders with respect to
5 the approval of the plan, and it's a scant three pages.
6 I've been on holiday, and it seemed to me that one needn't
7 swing hard with the driver when faced with the beginning
8 cut, and that is --

9 JUSTICE ROMAINE: I don't understand that,
10 Mr. Gorman, I think you'll have to explain that.

11 MR. GORMAN: I think we need Justice
12 Delvecchio to explain that analogy, My Lady.

13 My Lady, the absence of applications
14 throughout this process have been to maximize recovery of
15 assets, and we've heard from the commercial trust, we've
16 heard from the ULC2 before their convergence under the CCRC
17 and since, that the ULC1 people should be forced with a
18 choice. You want this plead in the Canadian assets, which
19 would be the notes, the Salten proceeds, and the money in
20 the accounts, or do you want to pursue the guaranteed
21 claims, both the initial guarantee and the guarantees under
22 the hybrid note structure. And in the spring of this year,
23 after significant negotiations, we gave the CCRC creditors
24 what they asked for, which was we moved from looking at the
25 Canadian assets, other than intercompany accounts, to a

1 resolution where we would focus our attention on recoveries
2 from CORPX and the US debtors under the guaranteed plan.
3 And this became sort of the lynchpin for the unlocking that
4 has occurred. There is a significant benefit for other
5 Canadian creditors in that Salten proceeds, the CCRC note
6 proceeds, our part of the settlement, and that's what's
7 occurred.

8 With respect to the timing, and should
9 things be delayed in the implementation of the settlement,
10 I remind My Lady that we started fighting with the CCRC
11 notes last summer when they were trading at about half of
12 what the current potential marketing plan is, and at that
13 time the trust and ULC2s were adamant, don't wait, let's
14 get the sale process going. It now can proceed in a timely
15 manner to maximize the recoveries, otherwise with respect
16 to the Calpine estate so as to satisfy the settlement, our
17 client now, they didn't want to be at risk last year, I
18 don't think anyone also wanted to be at risk this year, and
19 don't let a creditor who still has some contingent claims
20 get too much leverage in the process by derailing this
21 significant settlement achievement.

22 With respect to the ULC1 holders, I think
23 it's significant to note, and the numbers are in paragraph
24 8 of the brief, that over 55 percent of one series and 59
25 percent of the other series of bonds have negotiated with

1 its ULC1 trustee to provide the letters of direction and
2 the required indemnity, and significantly no ULC1 note
3 holder has filed any opposition to this plan. You have a
4 predominant creditor supporting the settlement agreement,
5 and that's the stage we are at because we've got the
6 settlement agreement that is supported. Let's move it
7 forward, and let's move these estates forward by
8 implementing a settlement, getting the extension, and
9 getting the notes sold at the appropriate time at the
10 appropriate price. Thank you.

11 JUSTICE ROMAINE: Thank you, Mr. Gorman.

12 Mr. Smith?

13 MR. SMITH: My Lady and your Honor, Quincy
14 Smith of Fraser Milner Casgrain. I speak for Alliance
15 Pipeline who are a 30 million dollar creditor of CESCA.
16 They have reviewed the material and are happy to support
17 Mr. Meyers' application for approval of the global
18 settlement.

19 I also speak as agent for Mr. Salard as
20 solicitor for Westpoint Energy, who are a 67 million dollar
21 creditor, he said 66 of CCRC. They also have reviewed the
22 material and support Mr. Meyers application for approval.

23 Thank you.

24 JUSTICE ROMAINE: Thank you, Mr. Smith.

25 MR. McCLAIN: My Lady, Douglas McClain for

1 TransCanada Pipeline and Nova Gas Transmission.

2 As we have not appeared in that in these
3 proceedings before, it may be of some benefit to give you
4 some sense of TransCanada's position in both the CCAA
5 Canadian proceedings, and also in the US Chapter 11
6 proceedings. In the Canadian proceedings between
7 TransCanada and Nova they have collectively undiscounted
8 claim exceeding one hundred million dollars. These claims
9 arise out of transportation agreements which have been
10 rejected by the debtor.

11 In the US Chapter 11 proceedings,
12 TransCanada and Nova have guaranteed claims against the US
13 debtor arising out of these same contracts which were at
14 issue in the Canadian proceedings.

15 Additionally, TransCanada has subsidiaries,
16 Portland Natural Gas Transmission, and GTN or Gas
17 Transmission North, which between them have undiscounted
18 claims in excess of 725 million dollars US.

19 So collectively in both proceedings
20 TransCanada is a significant creditor. With the exception
21 of small guarantee amounts and amounts which were small
22 amounts which were secured by letters of credit,
23 TransCanada's claims are substantially unsecured, and its
24 position in both proceedings is basically as an unsecured
25 creditor.

1 Having regard to the application before the
2 court, it clearly resolves a host of issues and provides a
3 basis for resolving others. With respect to TransCanada's
4 position as a substantial unsecured creditor, both
5 TransCanada and Nova have properly considered the motion
6 and have no objection to the relief there is being sought
7 on this motion by the Canadian Calpine debtors.

8 Thank you.

9 JUSTICE ROMAINE: Thank you, Mr. McClain.

10 Does anyone else wish to speak in favor of
11 approval of the settlement agreement before the monitor
12 speaks? Perhaps Mr. McCarthy; Mr. Griffith? Thank you.

13 MR. GRIFFIN: Thank you, My Lady. Peter
14 Griffin for the US debtors, your Honor.

15 The US debtors are obviously pleased to be
16 both in the US court and Canadian court in support of this
17 global settlement agreement. I can see that the US debtors
18 were uniquely positioned to participate in and deliver this
19 result in conjunction with the Canadian debtors as,
20 obviously, not only equity holder, but subordinating
21 creditor and creditor of the Canadian estate.

22 It goes without saying, and we've heard
23 much about it and you see it in the material of the
24 benefits. My respectful submission of this settlement
25 agreement are obvious. It is an agreement which resolves

1 much, delivers solutions or the method to arrive at a
2 solution on an expedited basis, unlocks value and
3 facilitates moving forward with respect to these estates.
4 And there are time, My Lady, in any estate or series of
5 estates, when there is the potential for a great step
6 forward, and this is indeed one of those, which has been
7 reached by virtue of this agreement. And it is for that
8 reason that you can see it so exhaustively, and properly
9 reviewed by the monitor in the 23rd report to give you the
10 type of analysis of all of the stakeholders expect and
11 deserve and are pleased to receive from the monitor as to
12 the obvious benefits of the settlement.

13 At the end of the day, in my respectful
14 submission, this is the very sort of facilitated forward
15 looking result which the jurisdiction of this court exists
16 to support and endorse approval.

17 JUSTICE ROMAINE: Thank you Mr. Griffin.

18 MR. GRIFFIN: My Lady, can I deal with one
19 other point. I was a bit dismayed to see this afternoon
20 that we were sitting with a jury. I would caution you to
21 relieve no issue in this application.

22 JUSTICE ROMAINE: Two facts to be founded.

23 MR. DeWAAL: My Lady, your Honor, Rinus
24 deWaal of the committee of unsecured creditors in the US
25 proceedings.

1 As you've heard from Mr. Staber in the US
2 courtroom, we support the application. For the reasons
3 that have been stated with we think that's the way that it
4 should go, and we, for that reason, support this.

5 JUSTICE ROMAINE: Thank you, Mr. DeWaal.

6 MR. RABINOVITCH. Good afternoon, your
7 Honor. Neil Rabinovitch for the second lien committee.
8 Just to echo what my colleague Ms. McColm said in the US
9 court, we are delighted that some very very complicated
10 issues have been resolved between the two estates, and we
11 are very pleased and hopeful the settlement will proceed,
12 and that both estates can move expeditiously to
13 distributing funds to their creditors. Thank you.

14 JUSTICE ROMAINE: Thank you, Mr.
15 Rabinovitch.

16 Does anyone else before I call upon counsel
17 for the monitor?

18 Thank you. Mr. McCarthy?

19 MR. MCCARTHY: My Lady and your Honor, we
20 have all of the submissions from the monitor are contained
21 in the many pages of the report, the 23rd report that you
22 have before you. Having experience with Judge Lifland and
23 you, My Lady, I am confident that both of you have read
24 every word of all of that.

25 On that assumption, I don't intend to say

1 any more than obviously that the monitor does recommend
2 this arrangement. And, secondly, that it is, as has
3 previously been said in my submission, a credit to the
4 debtors in the US and Canada, and if I may is so on behalf
5 of my client, a credit to the work done by Neil Narfason
6 and Mary McDonald and their staff in interfacing, and in
7 some case mediating the many issues that you see in the
8 complex agreement before you.

9 And, your Honor, if you have any questions
10 on the monitor's report, I'd be happy to answer them. And
11 again, My Lady, if you have any, I would be happy to answer
12 them as well.

13 JUSTICE ROMAINE: I have none. Judge
14 Lifland?

15 JUDGE LIFLAND: I have none except to
16 observe the monitor's report was the most quoted in all the
17 submissions that I've received.

18 JUSTICE ROMAINE: I guess that's a
19 complement.

20 MR. MCCARTHY: Thank you, your Honor, My
21 Lady.

22 JUSTICE ROMAINE: Mr. Meyers?

23 MR. MEYERS: My Lady, I wonder if I can
24 just hand up the register the confidential supplemental
25 affidavit.

1 JUSTICE ROMAINE: Thank you.

2 I guess, Judge Lifland, we will go back to
3 you for the next step.

4 JUDGE LIFLAND: Certainly.

5 JUSTICE ROMAINE: Thank you.

6 MR. SELIGMAN: Your Honor, we would next
7 like to turn to any objections to the settlement lodged in
8 the US proceedings.

9 With respect to the ULC1 indentured
10 trustee, we've been making continued progress there, and to
11 allow that process to continue without necessarily having
12 arguments made on that aspect, I would ask that if we can
13 reserve on that issue until after the Canadian objections
14 are heard, I think hopefully that will facilitate that
15 process and focus on resolution rather than in this area of
16 the argument.

17 JUDGE LIFLAND: Well, it's my understanding
18 that the ULC1 trustee's objection are the only objection
19 that's really going to the merits of the settlement. And
20 if that's in the process of possibly being resolved, we can
21 defer that argument and pass it back to the Canadian court.

22 MR. SELIGMAN: Your Honor, I just didn't
23 know if any of the other objectors wanted to make a
24 statement here. On behalf of the equity, I notice Mr.
25 Eckstein rising.

1 MR. ECKSTEIN: Good afternoon, your Honor.

2 JUDGE LIFLAND: Retrieving the gavel.

3 MR. ECKSTEIN: Good afternoon, your Honor.

4 Kenneth Eckstein of Kramer Levin, counsel for the ad hoc
5 committee of CCRC creditors which consists of both of the
6 ULC2 bond holders and the CLP income fund.

7 Your Honor, I would certainly find it much
8 easier to join the chorus of parties who are complementing
9 the court, complementing the company, and complementing
10 each other for achieving such an outstanding outcome.

11 Regrettably --

12 JUDGE LIFLAND: I knew there was a but.

13 MR. ECKSTEIN: Regrettably, we are not in
14 the same position, although I do think it's important to
15 share the perspective that there is an additional hero, I
16 think, in the case, in addition to, I believe, the efforts
17 that the court did bring to ensure that there was a
18 protocol and a process, and that is the market. The fact
19 of the matter is, as some of the parties have indicated, a
20 year ago we had all of these issues pending in this case
21 and there was no ability to reach resolution. As your
22 Honor recalls, there was a strong desire to have the bonds
23 sold, and for some reason that was not accomplishable.

24 Today, with the power markets where they
25 are, with the Calpine debt at a level where I believe the

1 parties are expecting to only be disputing the computations
2 of postpetition interest and make wholes, there is an
3 ability to somehow smooth over a multitude of problems.
4 And there's no question that the proposed settlement today
5 takes advantage of the market, and certainly does so
6 effectively by suggesting that everybody has figured out a
7 way to get paid in full. And if in fact that were true for
8 my constituency, I probably would also be standing here and
9 join the chorus of support.

10 The fact of the matter is, your Honor,
11 unfortunately while the parties suggest that we will be
12 paid in full, I did hear Mr. Seligman acknowledge that in
13 fact with respect to the ULC2 bonds and CLP income fund,
14 our claims have not yet been resolved. There are financial
15 disputes that remain open, for some reason the parties did
16 not see fit to try to bring those to foreclosure before
17 today. And unfortunately we stand here today being told
18 that we shouldn't worry that at some time in the future
19 they will get to our claims and resolve those.

20 The income fund claim is called a disputed
21 claim. It's a 500 million dollar contract claim that we
22 are told may get resolved at some point in time. It's not
23 great comfort to us, your Honor, to simply be told that we
24 can possibly look to a guarantee if there are no funds in
25 Canada to resolve those claims. We don't know what that

1 guarantee will be worth, maybe it will be worth what it's
2 worth today, maybe it will be would this less.

3 Your Honor will note that with respect to
4 ULC1, they were willing to live only with their guarantee
5 because they reached an agreement to backstop that
6 guarantee with two-thirds of an additional claim in the US.
7 We don't have the benefit of that arrangement, your Honor,
8 so therefore we have to rely solely upon our rights.

9 Your Honor, we are not suggesting that a
10 global resolution is not in order, we are not suggesting
11 that the sale of the ULC1 bonds are not in order. What we
12 are concerned about, and I will defer to Mr. Thornton in
13 Canada who is going to make the substantive arguments, we
14 believe that where there has not a full consensus in a
15 proceeding, whether it's in the US or in Canada, the right
16 way to proceed is to submit a resolution to the creditors
17 for a vote and let the creditors speak through a plan of
18 reorganization as to whether or not they do or do not want
19 to support this resolution.

20 In the absence of a complete consensus, we
21 believe that there is a responsibility on the part of the
22 debtors and an obligation imposed upon the proceeding to
23 rely upon the process that we have both in the US and in
24 Canada, which is creditor vote. Let the creditors
25 determine whether in fact they do want to support this.

1 And in the process of the vote, and in the process of a
2 confirmation proceeding, you would, I would expect, be able
3 to work through the claims and we would have the
4 opportunity over the next several weeks and months, which I
5 think is what the debtors suggest, to both resolve the ULC2
6 claims and resolve the income fund claim so that we can
7 determine whether in fact we will be paid in full, or
8 whether or not in fact it's appropriate to allow monies to
9 leave Canada into the United States prematurely. Because
10 right now the suggestion is that before the ULC2 claims are
11 paid, before the income funds claim has even be
12 adjudicated, 75 million dollars of funds will move from
13 Canada to the US, and whether that's in respect of a debt
14 or in respect of equity, we would submit that that is not
15 permitted or authorized under the bankruptcy process.

16 So, your Honor, that is the perspective of
17 my constituency, since we are standing really from the
18 perspective of the guaranteed claims, I think it's
19 appropriate to let Mr. Thornton articulate the Canadian
20 issue, which I believe governs both the ULC2 rights and the
21 income fund rights. Thank you, your Honor.

22 JUDGE LIFLAND: Thank you, Mr. Eckstein.

23 MR. FREDERICKS: Your Honor, Ian Fredericks
24 on behalf of the ULC2 indentured trustee.

25 I would also like to allow my Canadian

1 counsel, Mr. Dunphy, to speak first to the issues, because
2 I believe they involve primarily Canadian issues, and then,
3 to the extent anything else is necessary, I request that
4 the court allow me to speak in after Mr. Dunphy has
5 concluded.

6 JUDGE LIFLAND: We'll play it out,
7 Counselor.

8 MR. SELIGMAN: Your Honor, if I could just
9 respond briefly pursuant to schedule, and I'm going to
10 defer to Canadian counsel for the Canadian debtors to speak
11 to the issues of Canadian Bankruptcy Law, I'm not proposing
12 to be an expert in that area.

13 Just one or two clarifying notes. Mr.
14 Eckstein spoke about the lack of clarity or timing of
15 payment of the ULC2 bonds. I think that what's been set
16 forth and what the documents contemplate, that as soon as
17 there is distribution to anybody, it's going to include
18 distributions to the ULC2 bondholders, and Canadian counsel
19 for the Canadian debtors can confirm that.

20 There hasn't been agreement on the exact
21 amounts of the interest because it's very clear that you
22 have an issue of currencies in pounds and currencies in
23 Euros, and there's different conventions about how you
24 calculate interest, but it's literally a couple million
25 dollars difference on a 350 million dollar issuance.

1 There is an issue of a make whole of
2 perhaps almost 50 million dollars alleged. I think
3 everyone has agreed it's going to be paid out -- what's
4 agreed to is going to be paid out; what's not agreed to,
5 that 50 million dollars in the make whole, the couple
6 million dollars in interest, that's going to be reserved,
7 so there shouldn't be any issue as to the ULC2 note holders
8 getting paid in full whatever their claims are ultimately
9 determined to be. It's not going to be an issue. They
10 continue raise that issue, but I just want to make it clear
11 for your Honor.

12 As to the issue of the CLP claims, when
13 it's going to be decided and the lack of clarity on that
14 point, just to remind your Honor that in the Canadian
15 debtors' replied bench brief they did lay out a proposed
16 schedule for resolving that claim. I won't go through the
17 schedule, but do note that they contemplate a hearing in
18 the last week of October or the first week of November with
19 respect to that hearing. I think all parties have an
20 interest in getting the claim adjudicated quickly and
21 promptly, and the fact that the parties have worked
22 together on the issues between the Canadian debtors and US
23 debtors to agree upon a schedule to resolve that claim as
24 soon as possible as indicated before, speaks volumes to the
25 process.

1 As to the third point raised by Mr.
2 Eckstein, again, as to whether this should be put to a vote
3 or not under Canadian law, I'll defer to my colleague in
4 the Canadian proceedings to address that.

5 JUDGE LIFLAND: Do I understand, then,
6 what's contemplated, at least the principal amount of 350
7 million dollars will be paid?

8 MR. SELIGMAN: That's my understanding that
9 that will be paid upon the bond sale, that there will
10 presumably be an application --

11 JUDGE LIFLAND: Leaving only the issue of
12 make whole and interest differentials.

13 MR. SELIGMAN: That's correct, your Honor.

14 MR. FREDERICKS: Respectfully, your Honor,
15 Ian Fredericks again in response to Mr. Seligman's comments
16 that involve the 350 million dollars, I believe that he's
17 speaking of only speaks to the ULC2 bonds that are held by
18 third parties. There is the issue, as indentured trustee,
19 that certain of these bonds are held by Canadian
20 affiliates, and the indentured trustee's position is that
21 we have not been provided proof that these bonds have been
22 canceled or otherwise satisfied. And before our claim can
23 be compromised, one of the issues -- we don't believe our
24 issuance can be compromised. Before the settlement can be
25 approved, either the US debtors, Canadian debtors, or

1 someone else needs to provide us with proof that these
2 bonds have been canceled, or they also need to pay us on
3 account of those bonds as well. So with we don't believe
4 that the 350 million, or payment of the 350 million dollars
5 resolves our claims, or comes close to paying it in full.

6 JUDGE LIFLAND: Thank you, Counselor.

7 MR. SELIGMAN: Your Honor, just with
8 respect to that, and I'll defer to the Canadian counsel to
9 address the issue. But, yes, there are bonds held by the
10 Canadian debtors, whether they are treated cancelled or
11 there's a round trip of funds, economically it's not going
12 to make a difference, and I will leave it to the monitor
13 and to counsel for the Canadian debtors to speak to the
14 issue, but I don't think there's an issue of dispute of
15 making sure that the third party bond holds will be paid.

16 JUDGE LIFLAND: Very well.

17 MR. ECKSTEIN: Your Honor, at the risk of
18 leaving the record open, there are a number of other
19 categories and claims that will need to be resolved that
20 are not yet resolved, and I didn't want to omit those from
21 at least being mentioned on the record.

22 JUDGE LIFLAND: My only inquiry was, in
23 concept, of the principle amount of the bonds is a bond
24 payment.

25 MR. ECKSTEIN: I understand fully what it

1 says --

2 JUDGE LIFLAND: We'll pass over to the
3 Canadian court at this point.

4 MR. SELIGMAN: Thank you, your Honor.

5 JUDGE LIFLAND: My Lady?

6 JUSTICE ROMAINE: Thank you, Judge Lifland.

7 Mr. Meyers, Mr. Robinson, before I call on
8 Mr. Thornton, does anybody wish to address the question has
9 just been raised in the United States proceedings about
10 what happens to the ULC2 bonds held by the Canadian
11 debtors.

12 MR. MEYERS: Yes, thank you, My Lady. It's
13 good of the trustee to be concerned about our bonds, we
14 are, too. And there's an obligation that My Lady heard
15 about earlier to deal with the structure and a tax
16 efficient way of those issues are being considered, whether
17 the bond should merely be cancelled or whether the bonds
18 should flow through.

19 In the proposed order there are two
20 provisions of relevance. Paragraph 34 makes it clear that
21 the 75 million that goes to the United States is at the
22 same time as a payment of CCRC direct creditors, which
23 include the ULC2 bonds.

24 Secondly, in paragraph 21 we'll be handing
25 up a black line of the order, and one of the black lines it

1 has already been added, it's been matriculated to the list,
2 is a -- you saw in schedule B to our reply bench brief,
3 there is actually agreements; the ULC2 note holder's
4 trustee, and our financial advisors and theirs agreed on
5 what the amounts in issues are. And they are set out in
6 Schedule B.

7 Those amounts are now contained in the
8 order and will be held, as well as an additional amount to
9 be calculated out in respect of the Canadian debtors' bonds
10 in the event that the bonds are not cancelled. And we
11 understand that is a straight proportionality. We know the
12 amount of their bonds, the amount for our bonds is just a
13 percentage increase depending on the bonds.

14 So the matter is covered; all monies in
15 dispute will be held in escrow for the ULC2 bonds. They
16 will be paid.

17 JUSTICE ROMAINE: Okay, thank you, Mr.
18 Meyers.

19 Mr. Dunphy, are you starting?

20 MR. DUNPHY: Well, just on that point.

21 JUSTICE ROMAINE: Okay.

22 MR. DUNPHY: Since you asked about it. And
23 just to be very clear about it, I have other issues of
24 other aspects. But as trustee, the only thing we know are
25 the bonds that are issued.

1 We are told from reading onerous reports
2 that a certain number are held in Salten LP. I have taken
3 a number of things on faith in life; I suppose that can be
4 one of them. And without being a doubting Thomas about it,
5 I just don't know. And under our trust indenture, when I
6 get a dollar, it tells me exactly how to distribute it.
7 Who gets the first portion; I get the first dollar, but
8 after a few more of those come in, then we start to pass it
9 to the bond holders, and I have to pay all the bondholders
10 pro rata in relation to the bonds the I hold. And I don't
11 know Salten LP, I don't know how many they own, and if they
12 show up and say cancel these bonds, then they all live
13 happily ever after.

14 I will agree with Mr. Meyers on the make
15 hole; our financial advisors have had a dialogue. I don't
16 think the order is spot on in terms of catching the issue,
17 but I think we are mostly there, in that if necessary, even
18 in subsequent attendance that issue should be able to be
19 resolved quantum of the make whole amounts, as long as the
20 principal, whatever it is, gets tallied up and socked away,
21 we can deal with that. And I have something to say about
22 where it gets socked away, but I'll wait to get to that.

23 JUSTICE ROMAINE: Exactly. Okay, I'll
24 leave that issue and then turn to Mr. Thornton. Are you
25 going to be the first speaker?

1 MR. THORNTON: Yes, I am. Thank you, My
2 Lady. Good afternoon, your Honor.

3 I'm wondering if we could prevail upon the
4 US court to focus on your Honor rather than the very
5 talented group of gentleman we have in the front row?

6 JUSTICE ROMAINE: Judge Lifland, do you
7 mind?

8 MR. THORNTON: Because otherwise I'll be
9 making submissions to Mr. Seligman's empty chair. And even
10 when he is there to hear them, he hasn't been too receptive
11 of my submissions. I'm hoping to do better with Judge
12 Lifland.

13 JUSTICE ROMAINE: Okay.

14 JUDGE LIFLAND: That's not a problem.

15 JUSTICE ROMAINE: I'm not sure, Judge
16 Lifland, whether you heard that request.

17 Oh, there you are, okay. Thank you.

18 MR. THORNTON: Thank you, your Honor.
19 Thornton, initial R., and we represent the CCRC committee,
20 which is the committee composed of the majority of the
21 third party ULC2 bonds and CLP as since the purchase of
22 that entity earlier this month, and earlier this year in
23 this proceeding. And because of the breath and diversity
24 of our representation, for your Honor's benefit, we are
25 probably most analogous to what you would refer to as the

1 UCC.

2 In order to facilitate these submissions, I
3 would ask both courts if you would have and handy our bench
4 brief, our book of authorities, the revised settlement
5 agreement which I received Monday, but which I think
6 perhaps the courts received either Friday or over the
7 weekend, and the revised orders which I think are being
8 proposed in Canada and the US which we received in the last
9 day or two. In addition I will be making reference to the
10 monitor's report.

11
12 JUSTICE ROMAINE: I think that takes care
13 of 2 of the 3 volumes, Judge Lifland?

14 JUDGE LIFLAND: I think it spans across
15 three of mine.

16 JUSTICE ROMAINE: Mr. Meyers, if you have
17 an extra copy that would be useful.

18 (handing)

19 JUSTICE ROMAINE: Thank you.

20 MR. THORNTON: The references for both My
21 Lady and your Honor's benefit will not be extensive for
22 this material, but if we have difficulty locating it, I
23 will try to be mindful of that and help.

24 Now, a lot of work has gone into this
25 settlement. And there is a lot of benefits for both

1 estates in the settlement. And we are not suggesting that
2 this settlement should simply be thrown out, what we are
3 suggesting is that Canadian law must be complied with
4 before it can be implemented; and that is a key part of our
5 submission.

6 This settlement does not just effect the
7 parties to the settlement, it effects all of the Canadian
8 debtors and every creditor in the Canadian estate. And
9 that is why the monitor has examined the effects of this
10 settlement upon every Canadian debtor estate and the
11 recoveries of every Canadian debtor.

12 As it happens, there are some estates that
13 get paid in full and some estates that do not, or may not,
14 and that may is very important. Everyone is optimistic
15 that they will, but what the settlement actual contemplates
16 is they may get paid in full.

17 And what the settlement, in essence, as it
18 happens I should add, I suppose, as a matter of coincidence
19 I'm sure, the creditors we represent, who are at the CESCA
20 level, at the CCEL level, are the estates that are most
21 likely to be subject to a potential compromise, and there
22 are other non economic compromises that are being proposed
23 for the ULC2s, and we will go into those in some detail.

24 But the settlement agreement in its essence
25 represents a balance of risks, of tradeoffs, of negotiated

1 settlement and proposed compromises. In short, this
2 settlement is replete with business judgments. And as
3 such, under Canadian law, the affected creditors are the
4 ones who are required to decide whether the compromises,
5 viewed as a package, are acceptable.

6 The mechanism required under Canadian law
7 and the CCAA to discover the answer to that is through a
8 vote. And this is not a question of whether or not this is
9 a good deal, a fair deal, an equitable deal, or, in fact,
10 as I assume for the purposes of argument is, it's very best
11 deal that the Canadian debtors and the monitor could
12 negotiate under the circumstances. And I can understand
13 the desire of all of the parties who have spoken here today
14 and the courts to want to implement it.

15 But the issue is a question of who decides.
16 Can the court, this court, decide on its own, and thereby
17 force this package of compromises upon the creditors, or
18 must the creditors decide in the usual and recognized way
19 in Canada? And I emphasize here that the debtors seek not
20 just the approval of this settlement to go forward to a
21 vote of creditors, but an actual implementation of it.

22 The settlement agreement is a comprehensive
23 rearrangement of priorities and compromise of claims of the
24 Canadian creditors. Can the court impose it, or must it be
25 put to the creditors? That is the issue for this court

1 today.

2 My Lady, your Honor, I propose to examine
3 four areas of fact and law. Firstly, we will examine the
4 nature and extent of the compromises being proposed upon
5 three creditor groups, being the ULC2 creditors, the CESCA
6 creditors, and the CCEL creditors.

7 Secondly, we will examine the effect of the
8 approval and implementation now, as asked, what that would
9 have on the creditors and on the vote, and, in our
10 submissions, a subsequent vote to the implementation would,
11 in fact, be rendered meaningless. I will then examine the
12 jurisdiction of this court, and I will distinguish the
13 jurisdiction under Section 4 where a compromise is proposed
14 to a class of creditors or creditors generally from the
15 supervisory jurisdiction under Section 11.

16 We will also look at the jurisdiction under
17 Section 18.6 to coordinate foreign proceedings, and to
18 inherent jurisdiction to fill in the gaps when the statute
19 is silent. In so doing, I will then address the cases in
20 all of the bench briefs that have been filed with a view to
21 reconciling them along the bright line that says where
22 compromises are proposed upon a class or classes of
23 creditors, a vote and the protection of that fundamental
24 right must be protected by the CCA Supervisory Court, and
25 distinguished that from cases where there is no such

1 compromise being proposed.

2 And lastly, within the statutory
3 jurisdiction, I will propose a way that the court may
4 exercise its discretion within the statutory jurisdiction
5 that is available to this court in a way that promotes the
6 efficient finalization of the administration of the
7 Canadian estates, brings them to an expeditious resolution,
8 and more importantly, maximizes the possibility of
9 salvaging the benefits and all the good work and efforts
10 that have gone into the settlement agreement.

11 First, to the nature of the compromises,
12 and starting with the ULC2 trustee and its beneficiaries
13 the bond holders. My friend, Mr. Dunphy, will have more
14 submissions on this point, but I note three.

15 Firstly, the amounts were in dispute. And
16 in the first draft of the settlement agreement that
17 accompanied the motion materials, there were specific
18 amounts in there, and the amounts were in error. The
19 numbers were changed in the revised agreement, we don't
20 need to go to them actually, but let's just say that there
21 was a significant variance from our point of view. The
22 ULC2s believe that there is no reason to compromise
23 anything in this estate given their structural priority.

24 And so, when the numbers that were too low
25 and wrong in our opinion first showed up, we were most

1 disturbed about that. And we were told as well in the
2 bench briefs that every section of the settlement agreement
3 was precious and could not be changed without threatening
4 the picture as a whole. Well, they changed the numbers;
5 which I raise that only to point out that the settlement
6 agreement is not quite as immutable as the bench briefs
7 would have us believe, and it does show that what can
8 happen when you actually engage with the creditors who are
9 effected to try to clarify things, as should happen in this
10 case and as would happen if there was an establishment of a
11 voting mechanism, that those negotiations could occur.

12 So those amounts have been changed, and
13 there is a hope that there will be funds sufficient to put
14 aside to pay all of the ULC2s in full, to which we say that
15 is a good step in the right direction. But there are other
16 compromises that are inherent in this settlement agreement
17 as written, and I emphasize the following two.

18 Firstly, there is a release of claims
19 immediately, even though payment is deferred and
20 contingent. Contingent against at least upon the bond sale
21 and then contingent upon a subsequent court order. Now the
22 claims specifically that are released are oppression
23 claims, and they are not marker claims. And for the
24 benefit of Judge Lifland's who may not have this
25 background, prior to Calpine filing for protection in

1 Canada, Harbor, which is a bondholder, brought an
2 oppression action in Nova Scotia, which was the
3 jurisdiction of ULC2, to say that certain parties in the
4 Calpine empire were guilt of conduct that was asset
5 stripping, that materially and prejudicially and with
6 oppressive effect, disregarded the interests of the bond
7 holders. In fact, cash was being stripped out of Canada to
8 feed US needs.

9 Now, there is a judgment that was rendered
10 in the summer before the filing, and that judgment found
11 that CCRC and CORPX were guilty of oppressive conduct. The
12 claims that have been filed are against CCRC in Canada and
13 against QCH and CORPX in the United States. QCH was added
14 once we learned through the monitor's reports in this
15 proceedings, that it was intimately involved in the
16 transactions that were oppressive and that stripped the
17 assets out of Canada.

18 Now those claims were filed in accordance
19 with this court's claims procedure order on a timely basis,
20 they were based on an existing judgment and a finding of
21 oppression. There has been no dispute of those claims, and
22 there has been no judicial determination under the claims
23 process about those claims. But under the settlement
24 agreement those claims simply vanish, and they vanish
25 before payment. And here there's an interesting

1 distinction in the timing of what happens in the US and in
2 Canada, and this may be inadvertent, but in either way it's
3 prejudicial, and I just want to bring that to your
4 attention.

5 So let us look at the revised order
6 submitted to in the US proceeding.

7 JUSTICE ROMAINE: I don't have that order
8 in the US proceeding. I have the Canadian form of order,
9 but go ahead.

10 MR. THORNTON: Well, it's quite possible to
11 follow along without having the order in front of you.

12 JUSTICE ROMAINE: Okay.

13 MR. THORNTON: Paragraph 16 of that order
14 says that, "The claims included in Exhibit G to the
15 settlement agreement are hereby dismissed with prejudice or
16 deemed to be withdrawn with prejudice." That is, I think,
17 the exact same paragraph as is in the Canadian order in
18 paragraph 9.

19 JUSTICE ROMAINE: Thank you.

20 MR. THORNTON: Yes. In the Canadian order,
21 paragraph 9.

22 Now in the US order where it was paragraph
23 16, if we look at the tiny paragraph, while this is
24 effective in the US order, paragraph 5 says that paragraph
25 16 is effective upon entry of this order. So that means

1 that if this order is given today, our claims are gone
2 today before the bond sale may ever happen, and certainly
3 before any payment.

4 Now with respect to the Canadian order they
5 have, and may I emphasize, that would get rid of the
6 oppression claims against both CORPX and Quintana, QCH,
7 gone. Now the Canadian side of that equation is the
8 oppression claim against CCRC, and it is actually delayed,
9 under paragraph of the 5 of the Canadian order, to be
10 effective only when the bond sale us occurs, which is
11 little better, but in any event, what it is is a
12 compromise. It is an extinguishment of rights now before
13 payment, and I ask why? Why was that so important that
14 that had to be embodied into this settlement agreement?
15 Why couldn't the claims stay upstanding and be dismissed or
16 extinguished upon payment?

17 If they are going to be paid, they should
18 be paid. But the payment is contingent, and therefore
19 there is some risk. It may be small, but it is the
20 creditor's risk to choose to accept it or not. It is their
21 choice, in my submission, My Lady, not the courts.

22 And thirdly, there is a transfer of
23 jurisdiction inherent in the -- embodied in the settlement
24 agreement. The legal entitlement of the ULC1 trustee and
25 its note holders for their claims, as it stands today, is

1 established by the claims order in this proceeding with
2 respect to claims it has made in this proceeding pursuant
3 to those orders. And that includes an ability on your
4 part, My Lady, to call Judge Lifland and get advice about
5 US law, to the extent you feel you need to, under the
6 protocols that we have put in place.

7 But three things under the settlement
8 agreement are transferred to the U.S. Bankruptcy Court.
9 The ULC2's right to make whole payment, to the interest
10 that is in dispute and continues to be in dispute, and
11 certain fees of Harbinger -- of Harbor, pardon me, which I
12 will get to in a minute.

13 Now this is not a question of which is the
14 better court or the best court, this is a question of is
15 this a compromise of an existing right to people who are
16 non parties to the settlement, and it is. And let's look
17 it at it from Harbor's points of view. What is the
18 jurisdiction of the U.S. Bankruptcy Court to its claim
19 which has no connection to the US in any way? It is a
20 claim for recovery of fees in a Nova Scotia action against
21 Canadian entities, primarily, and that claim is not made
22 against CORPX, not made against any US debtor, and there is
23 no element of a guarantee involved in it.

24 JUSTICE ROMAINE: This is the Harbor fees
25 issue.

1 MR. THORNTON: This is the Harbor fees
2 issues. And furthermore, there is different treatment
3 under the US law of a litigant's fees than there are in
4 Canada. In Canada, a successful litigant has a reasonable
5 expectation of recovering at least some of their costs
6 against an unsuccessful defendant. And whether you --
7 pardon me. And in the US, a party litigant bears their own
8 costs except under extremely unusual circumstances, as I
9 understand it.

10 Now we say that the transfer of this
11 jurisdiction is possibly done with a view to seek different
12 treatment imposed, or we have to prove the entire Canadian
13 law of cost before the US Bankruptcy Court, which does not
14 seem to be a valuable use of anybody's time, and we are not
15 sure why this issue has to be determined there when it's
16 already a claim in this proceeding. And as you know, in
17 addition to the issue of success, we will be claiming
18 recovery on a quantum meruit basis, since it was that
19 litigation which stoppered up 280 million dollars of
20 Canadian -- of the Salten proceeds so that that asset did
21 not get stripped as a result of the oppressive conduct.

22 So, with the dispute about the amounts, the
23 release of the claims prior to payment, and the transfer of
24 jurisdiction from the rights as they now stand, there are a
25 number of compromises and arrangements that affects ULC2,

1 which would be an identifiable class or group of creditors
2 as we would ordinarily classify them in a Canadian
3 proceeding, and that is enough to bring this case, in our
4 submission, within the jurisdiction of Section 4 of the
5 CCAA.

6 But the settlement agreement goes much
7 further, and I do not have to rely on the compromise that's
8 proposed on ULC2, because there are also compromises on the
9 CESCA creditors. These are of economic significance, it
10 dwarfs the issues relating to ULC2.

11 And I turn now to the monitor's report, in
12 particular to the very important chart on page 15 of the
13 monitor's report. That chart shows the claims against
14 CESCA. And it shows, on the right hand side, that's on
15 page 15 at the top, the monitor's 23rd report. All right.

16 Your Honor and My Lady, you'll note in the
17 column on the extreme right hand side under recovery that
18 there were a range of recoveries specified for intercompany
19 trade creditors, CRA being the Canada Revenue Agency; the
20 CLP tool claims and gas transportation claims that range
21 between 64.7 percent and one hundred percent. You will
22 also note that the gross claim numbers in the first column
23 shows 500 million dollars of claims, approximately, and
24 recovery in the next column from the CCAA proceeding, that
25 is the proceeding that this court is dealing with, of only

1 324 million dollars. There is a shortfall of 177 million
2 dollars. And the monitor notes that it expects 151 or 2 of
3 those millions to be satisfied out of Chapter 11
4 proceeding, but still leaving a shortfall of some 25
5 million dollars at the end of the day.

6 Now, being forced to rely upon a guarantee,
7 when there is demonstrably sufficient value in Canada to be
8 paid in full, is of itself, in our view, a compromise. And
9 I pause here to note that the monitor has assumed one
10 hundred percent recovery under the guarantees in the US
11 preceding for the purposes of its analysis. And the
12 monitor is quite capable of making its own assessments, but
13 that also is a risk analysis and decision for the creditors
14 who are affected there and forced to rely on those
15 guarantees to make.

16 The fact of the matter is that the
17 recoveries from the US estate, and I emphasize this,
18 particularly with respect to undetermined claims,
19 unliquidated claims, are uncertain. They are uncertain as
20 to timing, they are uncertain as to amount, and they are
21 uncertain as to the form and value of consideration. There
22 is much work yet to be done before a plan is confirmed in
23 Chapter 11 and before these claims will see payment from
24 Chapter 11.

25 But in addition to that compromise, there

1 are four others that I would like to bring to the court's
2 attention. Firstly, there is the US 75 million dollar
3 priority payment of the CCRC. Secondly, there is the
4 cutoff of CCRC from making claims up into CCEL. Thirdly,
5 there's the settlement of the Greenfield litigation for 15
6 million that's as a net credit to CCRC as opposed to CESCA.
7 And lastly there's another collateral attacked on your
8 claims process, My Lady.

9 Now starting first with the US 75 million
10 dollar first charge cash payment, as Mr. Seligman calls it,
11 out of the CCRC estate. Is that a good deal or not? Well,
12 it resolves a lot of things, but the US has, as a matter of
13 fact, untested claims in Canada, and we say, after
14 extensive examination, those claims are unmeritorious.
15 Now, is 75 million dollars the right number? Is it coming
16 from the right place? We say that is part of the
17 creditors' judgment to accept this compromise as a
18 passenger or not.

19 Let's look then at the cutoff of CCRC. And
20 for this we need a bit of explanation. CESCA is a
21 partnership. Under Canadian law, the partner is liable for
22 the claims of the partnership. One of the partners here is
23 CCRC where a lot of the value in the Canadian estate
24 resides. CCRC, in turn, is wholly owned by CCEL, and CCRC
25 is an unlimited liability corporation. The key distinction

1 between an unlimited liability corporation and other
2 corporations is that the owners, called members, can be
3 forced to contribute to the assets of the unlimited
4 liability corporate estate until all of the ULC's creditors
5 are paid in full.

6 Now in this case, one of the creditors of
7 CCRC is CCEL, its parent. So under the corporate law that
8 establishes the liability of the member, CCEL is required
9 to contribute enough to CCRC so that CCRC will be able to
10 pay off its own member. That sets up a perfect setup. And
11 my friends say what a great deal it is that that claim has
12 been subordinated. We say that claim doesn't exist because
13 it would be set off in any event.

14 And furthermore, under the general rules as
15 uncharitable as it may be, wherever you have any fund that
16 a person who claims from that fund is owed money by the
17 fund, they have to make good on the claim before they get
18 anything out of it. That is in fact the situation we have
19 here. So whether it's setoff or subordination, the fact of
20 the matter is the creditors of CCRC are the claim up into
21 CCEL, and CCEL has a 575 million dollar intercompany claim
22 owing to it by QCH; we've known that since the monitor's
23 5th report, in appendix B, which is annexed to our bench
24 brief. That at today's values, and now that much QCH is
25 consolidated into the general US estate, is the single

1 biggest assets of the Canadian estate.

2 That asset, under the settlement agreement,
3 is being cut off from being available to the Canadian
4 creditors, because the settlement agreement purports to
5 terminate the member liability of CCEL, which owns that
6 receivable, which otherwise it would be liable to
7 contribute to the estate of CCRC.

8 So let's stop there. The CESCA creditors,
9 according to the monitor's report, could suffer a shortfall
10 as much in the Canadian estate of 176 million. Under the
11 settlement agreement, 75 million in cash, 575 million of an
12 intercompany receivable are being taken off the table for
13 the creditors of CESCA. We say there should be no need for
14 any creditor to be exposed even to the risk of a shortfall
15 when there is something in the neighborhood of 650 million
16 of value going to the US equity holder.

17 Now, these payments are really going on
18 account of the untested and we say unmeritorious claims of
19 the US creditors which should give rise to mere hold up
20 value. 650 million dollars; some hold up, some value.

21 JUSTICE ROMAINE: So, Mr. Thornton, you are
22 discounting the 7.4 billion dollars of claims that are no
23 longer being made against the Canadian estate as a result
24 of this settlement agreement.

25 MR. THORNTON: I am not balancing at all

1 the benefits and the burdens in the agreement, because that
2 is an inquiry as to whether this is a good deal or not.

3 What I am pointing out is that to the
4 extent legal rights are compromised upon a class of
5 creditors, that that class must have a vote, and that is a
6 fundamental right under Canadian restructuring law. And in
7 this case that right can be respected, and we still do not
8 have to throw out this settlement agreement. And I will
9 get exactly as to how we get there later in my submissions.

10 Now Greenfield. There is an a trend that
11 that was an inter-billed project, complete with a 20 year
12 power purchase agreement with a promise of material and all
13 municipal regulatory environmental approvals in place. It
14 was sold six weeks before filing to a non filed US
15 affiliate. It was transferred from CESCA for a hundred
16 dollars. It was one of the largest and most obvious
17 fraudulent conveyances I've seen in my 23 years of
18 practice, as I've said in this court previously, and it is
19 a claim for the benefit of the CESCA creditors. It was
20 CESCA's assets and transfer.

21 Now that claim is to be dismissed. And
22 under this settlement, there is a release by all Canadian
23 debtors and any creditors who claim through them. So that
24 action would be dead as a result of this settlement
25 agreement. And CESCA itself gets nothing on account of it.

1 It is settled by the reduction of a payment that CCRC would
2 otherwise have to make, but more importantly it settled for
3 15 million dollars.

4 Now, who came up with that number? The
5 parties that implemented that transaction in the first
6 place came up with that number. And do you have evidence
7 before you to vet that number on its own? I submit that
8 you do not. That is an element of the kind of decision a
9 creditor is entitled to make. In fact there's no whole
10 package worth that, and that is what the creditors should
11 be asked here by way of a vote.

12 And lastly, in terms of particular effect
13 upon Canadian creditors, we look at the adjudication of
14 disputed claims. The US debtors seeks to do, through the
15 settlement agreement, what you directly denied them on
16 their motion on April 4. They sought then a change to your
17 claims process order to be allowed to insert themselves
18 into that order, and in effect revoke or rework a notice of
19 dispute or disallowance that the monitor and the company
20 had put forward.

21 You will recall this was in relation to
22 CLP's repudiation claim with respect to the Calgary Energy
23 Center, the monitor and the company allowed that claim in
24 the amount of 142 million. CLP thinks the claim is much
25 higher, but the US debtors have a theory. They have a

1 theory that even though the new toll is lower than the old
2 toll, that the net damages claim is actually less than
3 zero. And I don't think they go so far as to say as the
4 CLP owes CESCA any money, but they do want an opportunity
5 to go at that again, even though they were unsuccessful in
6 asking you to do that directly, and they do that through
7 the provision of Section 2.8A sub 4 on page 22 of the
8 revised settlement agreement.

9 JUSTICE ROMAINE: I'm sorry, what page?

10 MR. THORNTON: Page 22.

11 JUSTICE ROMAINE: Thank you. Okay.

12 MR. THORNTON: If you look at sub 4 at the
13 top of that page, and about halfway down, the Canadian
14 guaranteed claims determination order will also provide for
15 the manner of participation in the judicial claims
16 determinations of the guaranteed claims by guarantors who
17 have submitted their guarantee obligations, so it's a long
18 way of saying that includes the US debtor with respect to
19 the CLP claim, to ensure, and this is the meat of it, that
20 such guarantors have all of their rights of participation
21 preserved, including the right to raise and have fully
22 determine any defenses or objections that the Canadian
23 debtor or monitor could have raised to the creditors'
24 claims, notwithstanding any statements of the Canadian
25 debtors position in any notices of revision they have

1 issued to date. Clearly trying to do indirectly what they
2 do could not do directly as determined by this court.

3 So not only does that represent a
4 compromise of the rights to CLP as they now stand, but is
5 also a collateral attack on both your claims process orders
6 and your order of April 4.

7 Now the monitor, in page 15 and 16 of its
8 report, also notes that that CLP claim is very important to
9 the CESCA creditor group as a whole. It is the swing
10 claim. Depending on how much it is determined that, and I
11 can say that at this point I believe all the parties are
12 agreed that needs to be determined, because I don't believe
13 it will be settled, that that claim is a swing vote, a
14 swing claim which determines whether or not the CESCA
15 creditors get paid in full under this settlement agreement.

16 Well that's a critical fact among all the
17 CESCA creditors, and having that determined would be of
18 great assistance in determining whether or not there is a
19 compromise being imposed on the CESCA creditors whether
20 they like it or not. It's a question of whether it needs
21 to go to a vote. So the determination of that issue, which
22 we are all in agreement should be done as expeditiously as
23 possible, we say should occur under that schedule and be so
24 ordered by you.

25 So, in summary, the CESCA creditors are

1 exposed to recovery as low as 64 percent. The size of the
2 CLP claim is a key driver of how much that compromise will
3 be. In addition, the rights of the CESCA creditors are
4 being compromised in a number of ways, recognizing that
5 there are benefits, recognizing also that we have always
6 maintained that the ULC1 claims, by virtue of the
7 nonrecourse nature of the notes, were not, in fact, through
8 claims as if this chain of assets in Canada, but there are
9 a complete -- the settlement agreement is a complete plan
10 of priorities it sets out who gets what and how from all of
11 the Canadian. Estates, and that in that regard it is more
12 like a plan outline and does propose compromises to classes
13 of creditors, and therefore must be put to a vote, which we
14 say should happen expeditiously so as to coordinate with
15 the US proceeding and be then in tandem with the resolution
16 of the CESCA claims so it can be determine whether or not
17 there are, in fact, economic compromises to be suffered by
18 the CESCA creditors.

19 JUSTICE ROMAINE: Mr. Thornton, I just seek
20 to take you up on the table on page 15, of course. The
21 table shows that the creditors of CESCA who are possibly at
22 risk are the trade creditors in the amount of 1.9 million
23 dollars, and the gas transportation claims creditors in the
24 amount of 23 million dollars. I don't hear the trade
25 creditors objecting to this approval of the settlement

1 agreement today, and I have heard from the gas
2 transportation claimants that they in fact support the
3 settlement.

4 Where is the risk to your clients?

5 MR. THORNTON: You have bought into the
6 argument that there will be recoveries --

7 JUSTICE ROMAINE: Perhaps I have.

8 MR. THORNTON: -- of one hundred percent
9 from the -- because you've identified the 25 million dollar
10 shortfall.

11 JUSTICE ROMAINE: I'm not talking about the
12 guarantees, I'm talking about the shortfall after taking
13 into account the guarantees.

14 MR. THORNTON: After taking in the
15 guarantees. Yes, I'm suggesting that from the point of
16 view of this court and whether or not there are
17 compromises, the mere fact that they are forced to look to
18 guarantees is in itself a compromise.

19 JUSTICE ROMAINE: Yes, I understand your
20 point.

21 MR. THORNTON: Now jurisdiction comes from
22 two places. A compromise can be consented to, and if it's
23 consented to, is binding upon that creditors. But it is
24 not within the jurisdiction of this court to impose a
25 compromise on a class of creditors without a vote of that

1 class, a two-thirds majority of vote in value and a
2 majority in number and a sanction order that says it's a
3 fair and reasonable compromise.

4 What we are doing here is skipping that
5 nasty step of the proposed compromised based on the fact
6 that some people haven't showed up or that some have and
7 they like it. That's good that they like it, that means
8 that there's a chance that this would actually be voted on
9 and approved, that this is not doomed to fail, but we
10 should go forward to a vote. But what you cannot say
11 today, My Lady, is that every creditor who is affected by
12 this compromise has signed off on this saying that they
13 accept it. And without that you must go through the
14 mechanism of having a vote.

15 We wish that they had. We don't see any
16 reason why they can't. The vote can happen here within the
17 timelines of what is the economic, legal and practical
18 necessities of this case.

19 The US debtor is not about to emerge from
20 Chapter 11. I don't believe it's scheduled before the end
21 of December. We are now at the end of July. We can have a
22 vote in a couple of months. We can have a determination of
23 these outstanding claims within that same time period. We
24 can be done. We don't need to skip over the fundamentally
25 important Canadian aspect of this restructuring, which is a

1 creditor vote of a proposed compromise. There is no need
2 to try to skip that bit. If this is such a good deal and
3 they have such creditor support, why are they not putting
4 it to a vote? Why are they asking this court to side step
5 and turn on its head the Canadian restructuring law, and
6 that is in essence our submission.

7 Now, if they say don't worry there's a vote
8 coming later, I say the train will have left the station.
9 This settlement agreement is, conveniently perhaps, but as
10 point of fact, wrapped together as one big ball. You don't
11 get the benefit of a clean bond sale unless you buy into
12 the structure of settlements and priorities established
13 through CCRC and CCEL, you don't get one without the other.

14 So, is that compromise worth it? Are those
15 benefits worth the burden? In my submission that is
16 exactly the question that our regime suggests must be put
17 to the creditors, and that's what we should do. And we
18 should be quick about it.

19 A vote after the settlement agreement is
20 implemented, a vote after this settlement is implemented
21 would mean nothing. You couldn't unscramble the egg at
22 that point. There is nothing from a military point of
23 view, after the settlement goes through, there is nothing
24 left to be done but bayonet the wounded. And we will see
25 then whether or not these creditors have a shortfall or

1 not. They should not be asked to take that risk, we don't
2 need to be asked to take the risk, we can determine that
3 beforehand, and we should do so before it's implemented.

4 Which brings me now to the issue of
5 jurisdiction. There are four relevant sources of
6 jurisdiction under Canadian restructuring law that possibly
7 come to bear here. Under Section 11 of the CCAA, you are
8 given jurisdiction to make such order as you consider
9 appropriate on an initial order or any other application.
10 That allows you to impose a broad stay to stabilize the
11 business of companies and do all manner of things that have
12 filled the case books with the appropriate extent of that
13 jurisdiction, and after the initial order, it is the
14 section that gives the jurisdiction to shepherd the process
15 along.

16 Now where that shepherding process
17 jurisdiction under Section 11 stops, and the jurisdiction
18 under Section 4 begins, is where there is a permanent
19 compromise or arrangement of rights being proposed by the
20 debtor upon the creditors generally or a class of
21 creditors. There is exactly what Section 4 says.

22 Section 4 then prescribes what your
23 jurisdiction is. It says you may, and implicitly may not,
24 choose to put it to a vote of the creditors duly called.
25 What it does not say is that you may decide to implement

1 the transaction and forego the vote. There is no such
2 authority within the CCAA.

3 Furthermore, where the statute is specific
4 as to what your discretion is, inherent jurisdiction cannot
5 pour in to fill the gap because there is no functional gap.
6 The statute says what must be done, and that is what we
7 must do in a way that helps the case move forward to a
8 resolution.

9 Now, there is also jurisdiction under
10 Section 18.6. 18.6 is meant to coordinate foreign
11 proceedings. And under that section, it is specifically --
12 that section is not so vigorous as to override a
13 fundamental right nor to override the statutory discretion
14 inherent in Section 4. I will deal with that in length
15 during the course of the cases, as I would like to address
16 the cases. I would like to address Red Cross, Palladium,
17 Air Canadian Stelco and Phelps, and I will do so in the
18 context of the distinction between of the sale function and
19 the shepherding function under Section 11 with the
20 requirement under Section 4.

21 Now, in both Red Cross and Palladium there
22 was a sale of substantially all of the assets. And now I
23 am mindful here that they are both Ontario cases. And I am
24 mindful of the fragmaster decision from the Alberta Court
25 of Appeals that suggests that perhaps liquidating all the

1 assets is not a jurisdiction that -- that should not be
2 done under the CCAA. So I will leave my Alberta co-counsel
3 from Peacock Linder to address the fragmaster decision
4 specifically. But because my friends would submit to you,
5 which submission I submit that they are wrong, that Red
6 Cross and Palladium stand against, me I'll address them
7 anyway, even though they might have been differently
8 decided had they been decided by this case.

9 So in Red Cross there was a sale of
10 substantially all of the assets. In essence, My Lady, the
11 case stands for the proposition that a debtor may propose
12 to convert its existing assets into cash, and that that
13 exchange does not affect a compromise on anybody, that's a
14 conversion of one asset for another. So that alone does
15 not amount to a compromise.

16 Now in the Red Cross case one creditor
17 said, don't do that, I want the debtor to consider going
18 concern restructuring. But Mr. Justice Blair, when he was
19 still at the trial level, held that there was, as a matter
20 of practicality and legality, there was no way the Red
21 Cross could stay in business, that the governments had made
22 the decision that the Red Cross was no longer going to be
23 responsible for the blood supply business in Canada because
24 of the social and political repercussions flowing from the
25 tainted blood scandal which this country so unfortunately

1 faced. So we found that there was no possibility of that
2 being a realistic possibility, and therefore the fact that
3 that was not being put forward or followed by them could
4 not be viewed as a compromise.

5 So Red Cross and Palladium, sale of all the
6 assets, exchanged the assets for cash, and provided you do
7 so in the right way, as we've learned here already in the
8 agreement sale, that you go through a process, that you are
9 content that there is no unfairness in the process, and
10 that the price is good, all of the sound air principals
11 that we've already debated at length in this part, that
12 court may, under its supervisory jurisdiction down under
13 Section 11, approve theit's conversion of assets.

14 Now in Air Canada, quite a different thing,
15 in Air Canada it negotiated -- Air Canada and its
16 affiliates negotiated a significant agreement with a major
17 constituent, GE. I had some familiarity with that having
18 been on the team that did that. It provided a significant
19 amount of exit financing, of new regional jet financing,
20 which was key to Air Canada's business plan, and most
21 importantly it offered a number of compromises on various
22 aircraft as the leading lessor in Air Canada's fleet,
23 approximately 25 percent of the fleet was leased with a GE
24 affiliate.

25 And that GE deal formed a building block to

1 what eventually became Air Canada's plan of arrangement.
2 But, and this is an important distinction, there were no
3 compromises of any other creditors' rights proposed or
4 inherent in the settlement agreement other than those that
5 directly affected GE, the party to the settlement. It did
6 not purport to compromise the rights of creditors
7 generally, nor any particular class of unsecured creditors,
8 only GE's rights were compromised.

9 And so I would submit to you that in that
10 case Section 4 never entered in. The parties accepted the
11 compromise, they asked the court to bless the transaction
12 as the building block under the supervisory, shepherding
13 jurisdiction in Section 11, and most importantly, My Lady,
14 they then put it to a vote. When they actually got enough
15 building blocks together to have a plan, that plan was put
16 to the vote and the deals inherent in the GE agreement
17 became effective upon exit. As opposed to here, where a
18 comprehensive plan of priorities and compromises are to be
19 effected immediately, without ever having a vote.

20 So then we turn to the similar kind of deal
21 approvals in Stelco. And again this is a case of interim
22 supervision under Section 11, as both the trial judge and
23 the Ontario Court of Appeals being clear. There were no
24 compromises or arrangements proposed on any creditors other
25 than those who are parties to the deal. There were three

1 of them, as I recall. The first was a collective agreement
2 there had been outstanding which the united steel workers
3 used to great advantage. It settled deals as between the
4 steel workers and Stelco but didn't effect anybody else.
5 Next, and I can assure you that there were no compromises
6 in there.

7 Secondly, it established how the pensions
8 were to be funded by the government, and the government was
9 a party to that deal, and that did not effect creditors
10 generally, it effected the funding of the pension plan.
11 And lastly they made a deal with Tricap, and Tricap offered
12 exit financing and that was approached. The only thing
13 that could be worried into a compromise of creditors
14 generally was that the Tricap financing had a break fee,
15 and the court, both at trial and in the Court of Appeals,
16 recognized that the break fee in and of itself was held to
17 be a reasonable one.

18 And I would submit, My Lady, that it is now
19 recognize that it is a cost of doing business of getting in
20 a value enhancing financing transaction that there needs to
21 be a break fee component when you are dealing with an
22 insolvent company. And the cost that of that value
23 enhancement cannot be viewed responsibly or practically as
24 coming within the meaning of compromise or arrangement of
25 creditors generally within the meaning of Section 4.

1 Now I would like to take you to some of the
2 things that the Ontario Court of Appeals said in Stelco.

3 JUSTICE ROMAINE: Mr. Thornton, I have
4 copies of these cases in several places; can you perhaps
5 tell me where I can find Stelco?

6 MR. THORNTON: Yes. If you look at the ad
7 hoc committee of creditors of Calpine Canada Resources
8 Company, that is at tab 5, My Lady.

9 JUSTICE ROMAINE: Okay.

10 MR. THORNTON: No, I am in error.

11 JUSTICE ROMAINE: Okay.

12 I've got it, found it. Thank you. Judge
13 Lifland, are you okay?

14 JUDGE LIFLAND: Yes, I'm fine.

15 JUSTICE ROMAINE: Okay. Thank you.

16 JUDGE LIFLAND: Does Mr. Thornton have an
17 estimate of how much more time he's reserving?

18 JUSTICE ROMAINE: I'm sorry, Judge Lifland,
19 I couldn't hear that.

20 JUDGE LIFLAND: Does the speaker have an
21 estimate of how much more time he's going to spend?

22 JUSTICE ROMAINE: Mr. Thornton?

23 MR. THORNTON: Yes, I suspect I would be
24 approximately another 15 to 20 minutes.

25 JUSTICE ROMAINE: Do you wish to call an

1 adjournments, Judge Lifland?

2 JUDGE LIFLAND: Why don't we wait until
3 he's finished.

4 MR. THORNTON: I'm actually having trouble
5 finding my copy of the case.

6 JUSTICE ROMAINE: It appears that it might
7 be a good time here to call an adjournment. Would you like
8 to do so?

9 JUDGE LIFLAND: Sure.

10 JUSTICE ROMAINE: Okay. How long do you
11 usually call.

12 JUDGE LIFLAND: I usually take five
13 minutes.

14 (Laughter)

15 JUSTICE ROMAINE: 20 minutes; is 20 minutes
16 all right?

17 JUDGE LIFLAND: Sure, 20 minutes.

18 (Whereupon a recess taken)

19 JUSTICE ROMAINE: Thank you. Please be
20 seated.

21 JUDGE LIFLAND: Is everyone refreshed?
22 Please be seated.

23 JUSTICE ROMAINE: Judge Lifland, we are
24 ready to continue? Are you ready?

25 JUDGE LIFLAND: We're ready.

1 JUSTICE ROMAINE: Mr. Thornton?

2 MR. THORNTON: Thank you, your Honor.

3 Thank you, My Lady.

4 In fact there are two different Stelco
5 cases in two briefs, which was the cause of my confusion.

6 I point you to the reply brief of the US
7 debtors at Tab C.

8 JUSTICE ROMAINE: Okay, thank you.

9 MR. THORNTON: So this is the Court of
10 Appeals decision after Justice Farley had approved the
11 interim deals to go forward with a plan and the bondholders
12 objected and said that any such plan was doomed to fail.
13 The Court of Appeals says, at paragraph 18, and I'm quoting
14 paragraph 18 and 19, "In my view the motion's judge have
15 the jurisdiction to make the orders he did authorizing
16 Stelco to enter into the agreements. Section 11 of the
17 CCAA provides a broad jurisdiction to impose terms and
18 conditions on the granting of the stay. In my view Section
19 11.4 includes the power to vary the stay and allow the
20 company to enter into agreements to facilitate the
21 restructuring, and I emphasize these following words,
22 provided that the creditors have the final decision under
23 Section 6 whether or not to approve a plan."

24 And then again at paragraph 19, they say,
25 "In my view, provided the other" -- pardon me "provided the

1 orders to do not usurp the rights of the creditors to
2 decide whether to approve the plan, the motion's judge has
3 the necessary jurisdiction to make them. The orders made
4 in this case do not usurp the Section 6 rights," and for
5 your Honor, that's the right to vote and Section 4 is the
6 right to call a meeting to hold the vote, "of the creditors
7 and do not unduly interfere with the business judgment of
8 the creditors. The orders move the process along to the
9 point to where the creditors are free to exercise their
10 rights at the creditors' meetings."

11 Now I would submit that what the court is
12 doing in that case is recognizing that the supervisory
13 shepherding jurisdiction under Section 11 runs up against a
14 wall when faced with a compromise proposed to the creditors
15 as we have in this case.

16 In this case, usurping the creditors'
17 rights is exactly what is being proposed as the debtors
18 here are not speaking mere approval of this deal, but
19 actual approval and approval of implementation of it now,
20 and without a creditors vote. It is the implementation
21 that compromises the rights of the creditors groups here,
22 and that rendered any subsequent vote meaningless for the
23 reasons I have previously described.

24 In both Stelco and Air Canada, the affect
25 upon other creditors of the largest complicated deals put

1 before the courts for interim approval there were delayed
2 in their implementation until after the creditors had their
3 say by way of a vote. It's ironic that in Stelco the bond
4 holders said, this is doomed to fail so don't you dare send
5 it to a vote. We are standing here today and saying the
6 debtors are trying to forego that vote please send it to
7 them.

8 Which brings us to the Phillips services
9 case. Now that case is to be found in our book of
10 authorities, the book of authorities of the ad hoc
11 committee creditors of CCRC, at Tab 3. Now in that case, a
12 cross-border case where both Canadian debtors and US
13 debtors, as here, and a compromise of rights of Canadian
14 creditors was proposed. In particular, under a joint plan,
15 some Canadian creditors who had claims against the parent
16 were to be dealt with in the US and not the Canadian plan,
17 and as such, they had no right to vote in the Canadian
18 meeting.

19 And the heart of the decision is in
20 paragraph 38 on page 11. And I quote it in its entirety.
21 "In my opinion, it is the loss of the right to vote in the
22 Canadian plan which lies at the heart of the present
23 dilemma. The mere fact that a Canadian creditor's rights
24 are to be dealt with and affected by a single or parallel
25 insolvency in the U.S. Bankruptcy Court, or that the

1 reverse may be the case, a US creditor in a Canadian court,
2 is not necessarily sufficient in itself to undermine the
3 fairness and reasonableness of a proposed plan." He cites
4 two cases there.

5 "In Canadian insolvency proceedings under
6 the CCAA, however, it is the right to vote on the
7 compromise or arrangement which the debtor company proposes
8 to make with them, which is the central counter part on the
9 part of the creditors to the debtor's right to attempt to
10 make that compromise or arrangement.

11 "In my view, having chosen to initiate and
12 take advantage of the CCAA proceedings, Phillips cannot now
13 evade the implications and statutory requirements of those
14 proceedings by seeking to carve out certain pesky and
15 potentially large contingent claims," and may I stop there
16 to say that if there ever was a perfectly pesky precedent
17 that is, for this case, "as a requirement to be dealt with
18 under a foreign regime where you will be treated less
19 fairly, while at the same time purporting to bind them to
20 the provisions of the Canadian plan, all of this without
21 the right to vote on the proposals."

22 JUSTICE ROMAINE: In Philips there was a
23 settlement and there was a plan, the two were distinct.
24 And these comments of Justice Blair referred to the plan,
25 did they not?

1 MR. THORNTON: Correct.

2 JUSTICE ROMAINE: Not the settlement
3 agreement. And the plan purported to cram down certain
4 creditors.

5 Mr. Dunphy, do you want to address that?

6 MR. DUNPHY: The plan certainly outlined on
7 what it would say, but it wasn't, I guess, proceeding to
8 votes, and so on and so on.

9 JUSTICE ROMAINE: Right. But they wanted
10 something identified clearly as a plan.

11 MR. DUNPHY: Yes, there was.

12 JUSTICE ROMAINE: And something identified
13 clearly as a settlement.

14 MR. DUNPHY: That's correct.

15 JUSTICE ROMAINE: Okay.

16 MR. THORNTON: As far as the United States,
17 there was a proposed settlement which was put forward to
18 the court, and various motions as to what should go forward
19 and how.

20 And in my submission it does not what you
21 call it, whether it's got the name plan in the title or
22 not, the word plan does not appear in Section 4. What
23 Section 4 addresses is whether there are proposed
24 compromises or arrangements.

25 So the fact that we have something called a

1 global settlement here, it doesn't call itself a plan, it
2 is certainly not the determination if there are not
3 proposed settlements and compromises. There are, in fact,
4 many settlements and compromises, as I have suggested in my
5 submissions, and it is up to the creditors to decide that
6 based on this court's jurisdiction to decide whether to put
7 it to a meeting and a vote or not.

8 MR. DUNPHY: In paragraph 17 of the
9 decision, Justice Blair says in Philip's perspective the
10 plan filed in both the US and Canada, according to the
11 debtor, so that we are clear to on that.

12 JUSTICE ROMAINE: Thank you.

13 MR. THORNTON: In my submission it doesn't
14 matter, because in this case what we have is a plan, not so
15 named.

16 Later at paragraph 42 we have the statement
17 of the law in Canada as I submit it now stands in terms of
18 when and how this court can compromise creditors' rights.
19 And that is to say that the rights of creditors under the
20 CCAA cannot be compromised unless, one, the creditor has
21 been given a right to vote in the appropriate class on the
22 proposed compromise, two, no mention of a plan there, B,
23 that the creditor's vote is in accordance with value
24 ascribed to the claim by a court approved procedure, we
25 have a claims procedure here, C, the class in which the

1 creditor has been appropriately placed as voted by a
2 majority in number and two-thirds in value in favor of the
3 compromise, and, D, the court has sanctioned the compromise
4 on the basis that is fair and reasonable with a
5 considerable deference being given by the court in this
6 regard with respect to the votes of the creditors.

7 Now that is not what is proposed here.
8 What is proposed here is an implementation of a proposed
9 compromise and arrangement which is a comprehensive plan,
10 and it may be a wonderful settlement, but it has not gone
11 through the steps required under Canadian law to effect a
12 compromise, and cannot be simply approved directly by this
13 court.

14 Now, we then turn to issues that are also
15 germane to this case regarding comedy and the jurisdiction
16 under Section 18.6. And Justice Blair says that the
17 jurisdiction you under 18.6 cannot override the statutory
18 requirement of the vote.

19 And I turn to paragraph 48 of the Philips
20 decision, starting in the middle of the paragraph at the
21 word however, "However, comedy and international
22 cooperation do not mean that one court must cede its
23 authority in jurisdiction over its own process or over the
24 application of the substantive laws of its own jurisdiction
25 whenever any kind of differences between the two

1 jurisdictions may arise. Both the protocol and the
2 provisions of subsection 18.6 sub 2 of the CCAA which gives
3 this court authority, 'to make such orders and grant such
4 relief as it considers appropriate to facilitate, improve
5 or implement arrangements that will result in the
6 coordination of proceedings under the CCAA, any foreign
7 proceeding, confirm this.'

8 "Sub Section 18.6 5 of the CCAA provides
9 that nothing in this section requires the court to make any
10 order." And he emphasizes that he is not in compliance
11 with the laws of Canada or in the force and the order made
12 by a foreign court.

13 So My Lady, I remember respectfully submit
14 that the Philips case has settled the issue of whether
15 Section 18.6 can be used as a back door through which the
16 jurisdiction clearly demanded in Section 4 where
17 compromises are proposed to be applied, and it can not.

18 In summary, courts' jurisdiction is found
19 and prescribed in Section 4 when a compromise arrangement
20 is proposed. The discretion provided within that
21 jurisdiction the is to determine whether or not to put the
22 matter to a vote, not to simply implement the compromise
23 directly.

24 No matter how appealing such a compromise
25 might be to this court and the creditors, it is not within

1 the jurisdiction of this court to do so. Such a cramdown
2 cannot be done in Canadian insolvency restructuring.

3 JUSTICE ROMAINE: Where do you say the
4 cramdown occurs here with respect to your clients?

5 MR. THORNTON: Correct.

6 JUSTICE ROMAINE: Where do you say it is
7 occurs here with respect to your clients.

8 MR. THORNTON: It occurs with respect to
9 all of the compromises that I have identified which we may
10 accept. They are 75 million out to the US debtor. It's
11 cutting off the claims in the CCEL. It is establishing the
12 foreign court as a jurisdiction to determine rights and
13 entitlements that are now before this court. They are all
14 of those things, which might be ironed out by the time we
15 actually have a vote, or it may be determined that the size
16 of the CLP claim is such that the CESCA creditors are in
17 fact are not compromised. But right now there is a
18 settlement being imposed that is at best a maybe in terms
19 of being paid in full from Canada, and that is the
20 cramdown. That is the matter that must, as a matter of
21 Canadian law, be put to the creditors.

22 And it can be done, I hasten to add, in a
23 time line that does no violence to the cases that are
24 before this court and the US court. We can still go
25 forward and do everything that we wish to do. There is no

1 screaming urgency here that requires us to travel upon the
2 Canadian insolvency regime to that requires a vote of
3 potential compromises.

4 JUSTICE ROMAINE: So you don't accept the
5 urgency argument with respect to the volatile of the market
6 being the necessity to sell the bonds as quickly as
7 possible.

8 MR. THORNTON: Well, as you know, My Lady,
9 we have on our record saying that bonds should have been
10 sold many, many months ago. Now in a perfect world we
11 would be done now, but the bond market has not been proved
12 as so volatile that we can't wait the extra 60 days that it
13 would take to get this thing to a vote, perhaps 90.

14 After a year and a half in this proceeding,
15 to suddenly now have everyone jump on the urgency band
16 wagon because they think that's the way to trample over
17 certain pesky creditors that might be standing in their
18 ways demanding a fundamental right like their right to
19 vote, there is no reason to suggest that now, of all times,
20 is this critical 90 day period.

21 So, My Lady and your Honor, I would submit
22 that the broad compromises that are contained within the
23 settlement agreement is, as hard bargained as they all were
24 and as wonderful a deal as they all might be, still
25 represent particular, potential, or and actual compromises

1 classes of the creditors in Canada which requires this
2 court to exercise jurisdiction under Section 4, and not
3 simply implement it under any other jurisdiction, because a
4 vote after the battle is over, the creditors --

5 JUSTICE ROMAINE: I think somebody walked
6 over the video camera.

7 JUDGE LIFLAND: Somebody is exercising
8 editorial prerogative.

9 (Laughter)

10 MR. THORNTON: I knew you were with me,
11 your Honor.

12 JUSTICE ROMAINE: Okay.

13 MR. THORNTON: The proposed compromises
14 here would be effective immediately, or forthwith. There
15 would be no vote. The battle would be over and the
16 creditors get what's left. And that's not the kind of
17 creditor protection that is required under the CCAA. It is
18 required under our regime. And it is spoken out by Justice
19 Blair in the Philips case, and in the Ontario Court of
20 Appeals in Stelco, and by the Alberta Court of Appeals in
21 fragmaster.

22 I pause here to mention that the
23 ramification of any decision to the contrary will be
24 important for future Canadian restructures. This is an
25 important case and an important issue. Increasingly,

1 Canadian restructurings have cross-border implication. And
2 there are those who believe that many elements of the
3 restructuring statutes of other jurisdictions, particularly
4 of our neighbors to the south, should be incorporated into
5 our CCAA. And, in fact, some of them are in the
6 legislation which has been passed but not yet proclaimed
7 enforced; however, even those provisions do not include a
8 cramdown provision such as being contemplated here today,
9 nor can they purport to give the court the jurisdiction to
10 forego a creditor vote of an effective class of creditors.

11 The decision in this case that would allow
12 the debtors and the court to implement a compromise or
13 arrangement without a vote over the objection of creditors
14 would have far reaching effects indeed. In our submission
15 such a change must come from Parliament and not from the
16 court.

17 I turned to turn to the last leg of my
18 submissions, mercifully for some I'm sure, and that has to
19 do with the discretion that this court has under Section 4
20 about how, and how we should go about putting this matter
21 to a vote. As I have is said, the two large creditor
22 groups which stand opposed today are the ULC2 bondholders
23 and the CESCA creditors, particularly CLP. The CLP has two
24 large undetermined claims, and those claims can be
25 determined on an expedited base.

1 A significant amount of work has already
2 gone into agreeing on a common model to calculate the
3 amount of the claim depending on various legal theories and
4 inputs, and a litigation timetable has been worked out
5 between the US and Canadian debtors and CLP. And we would
6 suggest that it would greatly assist the creditors, when
7 coming to a vote, to know what that CESCA claim is, and
8 whether, in fact, they are even being offered a compromise
9 by this settlement.

10 As it now stands it's somewhere between 65
11 and one hundred percent; and that's a range, and that's a
12 potential compromise. If we determine the claim, we will
13 know with certainty what the compromise is, if any. It is
14 our submission that it would be towards the lower end of
15 that scale, but that is a matter to be determined in this
16 process fairly and expeditiously, and that will inform the
17 decision. Likewise, the issues that separate us on the
18 ULC2 trustee's part can also be determined expeditiously
19 and within the time frame that a vote would be allowed.

20 So we say that this is not a case where
21 your discretion should be exercised not to put this to a
22 vote at all. We do not suggest we throw this agreement out
23 the window, because it is not doomed to fail. What we
24 suggest that practicality dictates and justice demands is
25 to put the handful of largest claims that are outstanding

1 into an expedited process in parallel with the vote that's
2 required and bring this entire proceeding to its practical
3 conclusion.

4 Lastly, I reemphasize, My Lady, where is
5 the urgency? We have, in fact, been at this, which is not
6 a restructuring but from the Canadian perspective a
7 liquidation, for a year and a half.

8 JUSTICE ROMAINE: Is that all?

9 MR. THORNTON: It just seems like three.
10 The US debtor does not need this cash. They are not
11 despite for this last 75 million dollars to stay in
12 business. They will do quite well. And they would be very
13 happy to receive this before or upon their exit from their
14 proceed I am sure. Time has been generous to this
15 proceeding in that the values have risen. And there is no
16 evidence before you that the bond market is such that it is
17 about to crater such that huge value is going to be lost.
18 So there is no urgency disclosed that would require you to
19 consider for a moment that there is some crisis that should
20 tempt you to eliminate a fundamental right of the Canadian
21 creditors to vote on this proposed compromise inherent in
22 the settlement agreement.

23 In fact, My Lady, it is our submission that
24 the debtors are trying to do this not because they have to,
25 but because of the weight and momentum they think they can.

1 And we say there is no jurisdiction in Canada to do that.

2 So in the end, My Lady, we are asking for a
3 brief delay in the implementation of this agreement and a
4 vote. And while that vote is being put in place, we should
5 do three things -- pardon me, one is the vote itself; two
6 other things. One is to direct the ULC creditor
7 entitlements to be determined as expeditiously as possible.
8 And thirdly, that the CLP claims be determined in
9 accordance with the schedule contained in the reply briefs.

10 In all cases that can be by the end of
11 October or the first week of November, creditors will have
12 clarity to know what they are getting, and more importantly
13 what they are not getting and what they are giving up in
14 the settlement agreement, and will be able to make an
15 informed decision, and most importantly, Canadian
16 restructuring law will be respected.

17 Those are our submissions.

18 JUSTICE ROMAINE: Thank you, Mr. Thornton.

19 Mr. Dunphy?

20 MR. DUNPHY: My Lady and your Honor, I will
21 be referring to exactly two volumes of things. To make
22 life a little simple, have I the affidavit of Sean Collins
23 from the 20th of July. I'm only using that because it has
24 the settlement agreement black lined in it as Exhibit E,
25 and at the tail end it's got the revised draft of the US

1 order that I had a few comments on. So I'll be turning to
2 that from time to time.

3 I have the affidavit of Jacob Smith, which
4 is the one that we filed on behalf of the ULC2 trustee.
5 And the only thing I'm going to be referring to in that is
6 Article 7 of the trust indenture, the ULC trust indenture
7 in a moment, and then finally our bench brief, but you can
8 get it elsewhere, it's the famous Philips case. I'm proud
9 to say it's the only case I've ever lost. But I can show
10 you something were where I've gotten from that.

11 Now I would very much like to join the
12 parade of counsel that is congratulating everyone on the
13 wonderful settlement that they had done. I'm sure that
14 there was a lot of hard work all around. My only complaint
15 was that in their excess of enthusiasm they decided to
16 settle my claims too. And I would very much of appreciated
17 a phone call or two just so we might compare notes. And I
18 note the contracts between what happened here and what
19 happened in my friend's court. Mr. Seligman stood up and
20 said he had all these committee and that he was keeping
21 them all up to date, maybe erroneously thought I read into
22 that, but they had probably seen drafts of the settlement
23 agreement once or twice, and maybe put into the order,
24 because I see the revised order has about six paragraphs on
25 the end stipulating that not a single change to the

1 settlement agreement is going to be made without those
2 committees having their say so. I have nothing like that
3 here reflecting the fact that this material was drafted
4 with a long session in front of a mirror. It was not
5 drafted by getting dialog with us, and that's where I would
6 submit using my analogy to the Philip case.

7 We need a level the playing field here.
8 They are close. They are very close. This is not, in the
9 abstract, a bad deal. There are a lot of good things done
10 here, there's been a lot of hard work done. We are very
11 close, but what we have is, in effect, unilateral deal, and
12 as my friend said a moment ago, relying in part upon the
13 momentum of a deal, let's see what else we can put on the
14 back of the train and get it down the tracks. And, My
15 Lady, I am saying there are some things you can't do that
16 way. We can fix them if we had a proper level playing
17 field and a single opportunity for dialogue. And at the
18 end of my submissions, I will give you a suggested fix, at
19 least for us, which is very simple and they are already all
20 in the documents. We don't have to do things in a
21 complicated way when it's fairly simple. I'll leave you in
22 suspense on that for a moment.

23 Now our main points are that the ULC2
24 trustee, standing as it does in the shoes for all the
25 bondholders, has compromises imposed upon it. You will see

1 in the settlement agreement and two draft orders that our
2 claim is determined at a number which is less than the face
3 amount of the bonds and which we say is inadequate
4 interest.

5 I'm going to take you to one that's
6 completely unnecessary for that one, but there's more; not
7 only is that claim determined with a without a hearing on
8 the merits, with a subsequent right which, in effect, to
9 revised claim, but it doesn't say that. It says we have an
10 allowed claim in one paragraph. Two paragraphs later it
11 says if it's a different number we can fix it. I guess I
12 read into that that I have some kind of right of appeal,
13 but I'm not sure what it means.

14 But, be that as it may, I have a bunch of
15 other claims. We have oppression claims filed against CCRC
16 backed by nothing less than a judgment by the Nova Scotia
17 court, and we have claims filed against the US debtor
18 backed by that same judgment. We have a number of claims
19 filed in the US and Canada, all of which are being
20 dismissed through and thoroughly without a hearing on the
21 merits. Now is if not though that is not a compromise on
22 my claim without a vote, I don't know what is.

23 JUSTICE ROMAINE: Well, Mr. Dunphy, it may
24 be that your claims have been recharacterized, but the
25 financial impact is the same, is it not?

1 MR. DUNPHY: No, it's absolutely not, it's
2 all a question of timing. And this all gets to the nub of
3 the matter. And I'll take you to it. Article 7 says, My
4 Lady, how you pay my off. Because what's really happened
5 -- let's take two steps back and look at this from on high.
6 What the US debtor and Canadian debtor are relying telling
7 you, break out the ticker tape parade, the market has been
8 good to us, and I congratulate them.

9 And as a result, the Canadian estate is
10 totally, if not certainly, probably not asset insolvent any
11 more. It may have appeared to be asset insolvent when they
12 filed, but what they are telling you is the claims sitting
13 on the books, who owes what to them, there is enough there
14 to pay everyone; they haven't done it yet, but they are
15 saying there is enough.

16 It may be liquidity insolvent, meaning that
17 absent of the sale of the ULC1 bonds they haven't got
18 enough money to pay their creditors right away, and many of
19 them have accelerated claims, but they are telling you they
20 are asset insolvent.

21 And what follows from that, of course, is
22 that now the US debtor says, well, I have the equity left
23 here and all the residual things are mine. And I have no
24 dispute with that; it is. I have only dispute with putting
25 the cart before the horse or after the horse; the equity

1 cart belongs behind the creditor horse, not in front of it.

2 So what we are seeing here is, in a dialog
3 between the US debtor and the Canadian debtor, I need not
4 point out wholly owned subsidiaries, in a case where equity
5 has restorative value, we have all of the equity, in
6 effect, being safe.

7 Well, I'll get the 75 million now, I'll get
8 a bunch of your claims against me canceled, and while we're
9 at it, I'm going to cancel, and, My Lady, I will not say
10 recharacterize, they are canceled. My claims are simply
11 gone. And in fact they are gone whether or not the
12 settlement agreement ever closes. They are gone whether or
13 not I'm ever paid out. They are gone whether or not we
14 have a 1929 again that crashes everything.

15 I'm not standing here telling you that I
16 want to take market risk and volatility risk. I'm still
17 saying sell the bonds yesterday and pay me thereafter. My
18 job as trustee is simply to recognize when the obligations
19 on the trust indenture have been satisfied, and they
20 haven't. There's a road map to do it right in the trust
21 indenture and you don't need my permission to do it. You
22 just flood me with money; it's easy and it's right in
23 there. And if there's too much it tells me what to do with
24 it; I give I it back to the company.

25 I'm a trustee; that's what I do. I hold

1 the money, I find it tells me who is entitled to it and I
2 give it out. It's right there. You don't need my
3 permission. You don't need a court order that says
4 anything. You don't need to dismiss my claim; you just
5 need to do it. So rather than say trust us you will be
6 paid, what I say is I'll trust you when I have been paid.
7 And until I have been paid axiomatically, I haven't. And
8 at the point in time where I haven't and all my claims are
9 flying out a window, that is a compromise. It is nothing
10 more or less than a compromise.

11 And, My Lady, there are a lot of things we
12 can do under the CCAA, it affords us a lot of latitude, but
13 not unlimited latitude. And as I heartedly concur with
14 what my friend said about Section 4 of CCAA. Look at the
15 definition of court in the CCAA. My claim can't just be
16 tossed over to another court to be determined, not in the
17 CCAA. If I'm being paid under the trust indenture,
18 different matter maybe. If you are looking for advice and
19 direction as a trustee, I might go to the superior court of
20 any province or in the State of New York possibly, but
21 there's a if I needed advice and directions; there's a
22 provision dealing with that.

23 If I'm being paid under the CCAA, then
24 either give me a vote or pay me out. And you can't just
25 invent a mechanism to do that. What they are trying to do

1 is come up with what is, in effect, an insolvency discount,
2 and they are not entitled to that. It's not like equity is
3 getting paid here. What they are entitled to do is give me
4 everything I'm owed, and when I'm not owed any more,
5 surprisingly enough I will have no more claims. So my
6 claim will die a natural death, not a premature one. They
7 will die a natural death when the trust indenture is
8 discharged. And there's a specific road map for how you do
9 it in Article 7, and I'll take you to it.

10 JUSTICE ROMAINE: Mr. Dunphy, and perhaps
11 this is a question that Mr. Meyers can help me with.

12 Do I understand today that I'm being told
13 in the Canadian order that the claims are not released
14 until the CLR2 notes have been paid. Mr Meyers?

15 MR. MEYERS: In the Canadian order, the
16 claims are released when the bonds are sold. And we will
17 have a commitment, an order of the court, requiring us to
18 come back here as soon as practicable to distribute the
19 money. And that's, of course, when the US will get their
20 75 million as well.

21 JUSTICE ROMAINE: Okay.

22 MR. MEYERS: The same fund; the same
23 distribution order. You will order us to come back and
24 bring that motion right on.

25 JUSTICE ROMAINE: Okay, thank you.

1 MR. DUNPHY: And I'm going to get to that
2 since I'm hopscotching all over my submission.

3 JUSTICE ROMAINE: Go ahead.

4 MR. DUNPHY: But the US order is patently
5 clear, in paragraph 16 and paragraph 5 of the draft US
6 order said, if memory serves me, those two paragraphs make
7 it of immediate effect so that my claims in the US are
8 evaporated on contact of your pen with that piece of paper,
9 your Honor's pen. So that's when my claims evaporate in
10 the United States. My claims in Canada apparently
11 evaporate on the completion of a bond sale, according to
12 the settlement agreement, after which I'm still not paid,
13 nor have I even got a certainty of being paid. I don't
14 have any money being held in trust for me anywhere that's
15 only for me and not for anyone else.

16 I then have the liberty of sitting back and
17 waiting for the subsequent application, which may or may
18 not be granted, and which may or may not involve different
19 circumstances arising between now and then, which may or
20 may not see me paid. In other words, while I'll probably
21 be paid, I don't know that I'll be paid. And it is
22 entirely unnecessary to compromise all of my rights if it
23 is assured that I will be paid. It is so simple to say to
24 the US debtor and the Canadian debtor both, if you are both
25 telling the court that the reason why you need pay no heed

1 to ULC2 is because they are going to be paid in full, then
2 stop wasting the court's time and mine with a bunch of
3 compromises that you don't need, because, as a matter of
4 law, when I am paid in full, all of those claims fall away.
5 And if it's eminent, if it's going to happen by September
6 30th, from their lips to God's ears, it should happen.

7 But it hasn't happened. And until it does
8 happen, I would submit Section 4 of the CCAA. This is not
9 an issue, it cannot pass. It cannot pass. When I am paid,
10 then I'm not compromised. When payment is in futuro and my
11 present, existing claim is evaporated on that hour, minute
12 and day, I have been compromised. And you need look no
13 farther than Section 4 to say there is no vote that
14 preceded that. It was not done by my voluntary concession,
15 and therefore my claim, having died an ignoble death on
16 that day, was compromised and it cannot pass under Section
17 4. There are many things they wish they could do, but
18 that's just not one of them.

19 But as I said, there is an easy way out
20 here because Article 7 tells you how to pay me off. And
21 I'm a trustee, and I'm used to holding money for other
22 people. And if it turns out you end up giving me a little
23 bit too much and I have to give a bit back, we can handle
24 that. And if it turns out that we have to come back to
25 the court for direction because my financial adviser and

1 the monitor can't agree on the right number or interest,
2 how long can that take? And will we have an issue on the
3 make whole? Well, we don't have an issue on the
4 calculation of it, but we do have an issue on the merits of
5 it, and that's what I'm owed by ULC2, a Canadian company.

6 And so, can we come back between now and
7 September 30th to have a hearing on that? I think we can.
8 Can we get a ruling before then? I should think so. Do
9 you need to have all this in the settlement agreement that
10 is jamming me in advance when your whole premises don't
11 listen to him because he's paid? Absolutely not. If you
12 are going to pay him anyway, then why insert provisions in
13 there dealing with the ULC2 trustee? You don't need it.
14 You've got Article 7. You don't need my consent to
15 discharge the obligations on the trust indenture.

16 I'm a passive preacher. I just follow
17 orders. Pay me money, I'm out of here. It's no discretion
18 on my part, just follow the map that's in Article 7. And
19 what follows from that follows from it. What my legal
20 entitlements are more, and unfortunately for them not less;
21 just what it is.

22 And that's the beginning of my end of
23 submissions, quite frankly, it's a little bit in the middle
24 which I'll get to now.

25 The first ask is what do we want? We want

1 to be paid in full before our claims fall away. We want
2 not the probability of settlement, but the certainty. We
3 want to know we have been paid. I don't want to have a
4 subsequent application to the court to say can I be paid
5 now and find out that revenue in Canada is reassessed. I
6 don't want to have a subsequent application and find out
7 that some other thing has happened and that values the have
8 plummeted to the floor and who knows what; not my cup of
9 tea. If that happens I'll live with it, if values do fall,
10 but then I keep all my claims. If I have three pockets to
11 pick to get paid then so be it. But until I'm paid, I'm
12 not.

13 So we want to have, as I said, nothing
14 prior to being paid, we want to have any dispute on quantum
15 settled by this court. Am I telling you that you cannot
16 have a joint hearing as we're having today? Absolutely
17 not. If you think it's warranted, it's merited, we can do
18 that.

19 The only justification for having my claims
20 determined in a different court is that the make whole
21 provision is set to be governed my New York law. Well,
22 guess what? This settlement agreement is governed by New
23 York law. Are we to understand by that, that by virtue of
24 having the settlement agreement that any subsequent
25 applications, including, while I'm at it, my getting paid

1 have to go now before the U.S. Bankruptcy Court because
2 it's governed by US law? Not at all. We have contracts
3 governed by foreign law every day of the week.

4 And the rules of conflicts of law are the
5 law of the forum is presumed to be the same unless there's
6 evidence lead to the contrary. There's no evidence to
7 suggest that New York law is the issue on the make whole,
8 it's the interplay between the trust indenture and the CCAA
9 where we are in kind of uncharted territory here. And that
10 is your domain. It's not what the words mean, it's how you
11 apply those words in the context of the CCAA. And with all
12 due respect to his Honor, that's not determined under the
13 US Bankruptcy Code, that's determined here.

14 And it's the obligation of a Canadian
15 company, ULC2, under the trust indenture that I'm saying
16 you can't just turn that away. And under the CCAA, which
17 is the only jurisdiction being invoked here to do all these
18 things, you must determine my claim. The court is not a
19 different court, it's you. It's the Alberta court.

20 So I would submit, and my second ask was
21 I'm in this court and I stay in this court. You can ask
22 for directions. We can do have joint hearings; I'm all
23 over all of that, but I can't be thrown out. I'm staying
24 here until you are done with me is my submission.

25 The third ask we have is that any disputed

1 sums, and if there appear to be some I won't bore you with
2 the details of that dispute because I'm sure we'll have a
3 chance to do that before you later, but there are some
4 legitimate disputes that add up to a relatively small sum
5 of money compared to the total amounts at issues but
6 there's some real numbers. There's about 30 odd million on
7 the make whole, and there's three quarters of a million to
8 a million in interest.

9 We were a couple million apart. We are now
10 about three quarters of a million apart. We may settle
11 those numbers out with further discussion, or we may need
12 your help. But our submission is if we are going to have
13 some escrow numbers, I don't want to have anything
14 preparatory in there, anything that may apply for an escrow
15 or anything something.

16 The only condition of my being paid should
17 be my legal entitlement on the resolution of that issue,
18 not whether some subsequent issues occurs and they become
19 asset insolvent again. If the premise is that we are all
20 asset insolvent, then pay me out and be done with me. But
21 I'm not losing my claims, and I'm taking the risk that
22 escrow is going to have somebody else putting their nose
23 into it and saying that's my money, too.

24 Article 7 says you pay the trustee, and
25 it's held in trust for the bond holders, and anything left

1 over goes back to the company. There I have absolute
2 certainty that the only thing left to be determined is your
3 ascertainment order, with the assistance of his Honor, if
4 necessary, of how much we are owed. So I could submit, my
5 third ask is the trustee is should get the money what it's
6 to be paid.

7 But, My Lady and your Honor, we've been
8 told that every term is sacred and nothing can be changed.
9 Much has been changed, including coming most of the way to
10 our interest number. We are about three quarters of a
11 million apart; we were a couple of a million apart before.
12 So they managed to change those, but they didn't get all
13 the way there.

14 So until the FMB told us an all or nothing
15 deal, I have no option but to say what is a pretty good
16 deal, what an is almost all the way there, I have no
17 objection but to say I'm asking you not to approve it.

18 I'm not a party to the settlement
19 agreement, I have no rights to it under it. And as I'll
20 take you to in a moment, the settlement agreement is
21 preparatory, which means it's a statement of intent, not a
22 legal obligation. Because the two parties, and I again
23 remind you, a wholly own subsidiary and parent, are they in
24 a situation where we are now talking about the equity of
25 the parent, can move assets around within those schedules.

1 I'll take you to some of those provisions
2 on their own. They don't need your consent. They sure
3 don't need mine. In fact there's an explicit provision in
4 there that says no one else has any rights under this
5 agreement. So that's why I'm asking you to say great
6 agreement, just don't make me bear the burden of it if I'm
7 not paid. If the whole premise of this is on being paid,
8 then just do so. But if there's a burden to be borne, it's
9 not mine.

10 So let's look at a couple of things where
11 I'll show you there is a lot of discretion built into this
12 agreement, which is worrisome, Section 2.2 sub 1 and 2 of
13 the settlement agreement. This is basically our get, one
14 of the big gets, which is all the claims the US and
15 Canadian claims. And you will see when you look at that
16 Section 2.2 sub 1 and 2, that they can.

17 JUSTICE ROMAINE: I'm sorry, I just got
18 to --

19 MR. DUNPHY: I just have to get my notes.

20 JUSTICE ROMAINE: Go ahead.

21 MR. DUNPHY: Section 2.2 sub 1 and sub 2,
22 says they can move these claims around in those schedules
23 and remove them. So although I'm being told that these
24 claims are subordinated, so a major benefit is, for
25 example, the US debtors subordinating a bunch of claims in

1 CESCA, but if they decide not to subordinate it tomorrow,
2 then they just remove it from the schedule and put it
3 somewhere else, and they can give the Canadian debtors'
4 consent. Will they consent? Probably not. But can they
5 consent? Yes. And is anyone else's consent required to
6 validate their consent? No. In fact, the thing says at
7 Section 5.3, "no other party has any rights under this
8 agreement but them."

9 So without your supervision, that could
10 happen. I am suggesting that shouldn't be the case.

11 The other thing we get from this agreement
12 is things we already have. Mr. Thornton referred you to
13 the rule on Cherry and Bolty, but we are being told the
14 major benefit of CCEL, a Canadian creditor, or I should say
15 a Canadian debtor, is going to agree to subordinate its
16 claims in CCRC. Well, that's a purely domestic internal
17 matter. I don't need the consent of the US debtor for
18 that, so I don't consider that to be a major concession
19 that we got from them in our own estate, and I don't
20 consider it to be anything of great merit, given the fact
21 that Canadian Bankruptcy Law, contributories are obliged to
22 contribute before they can share in the bankrupt estate in
23 the BIA, and we have the rule on Cherry and Bolty as well.

24 Now, the sale of the bonds, I agree. Sell
25 the bonds. But if the price is 90 million, I'm no not

1 going to make that decision as to whether that's a good
2 price or not, or 75 million, or whatever they are at. I am
3 in agreement with my friend that if that's to be done, that
4 that can go elsewhere. Don't ask me to make that business
5 call.

6 Then I want to refer to the compromises. I
7 took you to the biggest one, which is Exhibit G. And
8 Exhibit G says prior to payment in full of my claims, all
9 of my claims in the US and Canadian estates are evaporated.
10 And I submit, I can't be more candid, it simply can't be
11 done. There is no constitutional jurisdiction do that.
12 You can't dismiss a claim without hearing on the merits. I
13 filed a claim. I'm entitled to procedural due process.
14 And two parties sitting in a room somewhere else can't
15 decide for me to settle my claim, and they sure can't do it
16 based on a promise that I have no way of -- that is
17 unsecured, that I will be paid in the future. It's an
18 unsecured promise. We've got plenty of those already.
19 Thank you, very much. Payment I understand. Promises,
20 I've got a few.

21 Now Mr. Thornton took you through some of
22 the other ones, but I will just point out -- Greenfield
23 we've been through, the limitation on CCRC claims. Again
24 that's, you know, one of the reasons in which CCRC finds
25 the money to pay us is by paying its intercompany claims.

1 They are being capped. But the biggest one is our claim.

2 Our claim is being fixed at a number which
3 does not reflect our actual claim amount. It is less than
4 what you are owed. And if you look at the paragraph,
5 paragraph 21 fixes my number, and that's res judicata on
6 the day you sign it. It says what my claim is, yet somehow
7 in paragraph 25 there's a backhanded way that recognizes
8 that it might be readjusted later. Then don't fix my
9 claim.

10 Why don't you just say nothing on it? You
11 don't need to fix my claim. How about we just pay it, and
12 if we need some direction from the court, we'll get it? We
13 don't need to fix my claim. Am I appealing it? Have I got
14 an onus now to say it's not what they say; it's some other
15 number? What does that mean? So, it's not their business
16 to sit around a table and fix my claim for me. That's a
17 compromise. You can't do that.

18 And as I've said, there is simply no basis
19 in law to send a determination of my claim, under my trust
20 indenture, against my Canadian debtor to the US to be
21 resolved. It can't be done, because the resolution of the
22 claim in the CCAA, Section 12, and the definition of court
23 is court. It's you.

24 JUSTICE ROMAINE: It's not that that aspect
25 is not compromised you are suggesting.

1 MR. DUNPHY: I'm saying it's over the top.
2 I mean it's -- I've got a claim against a Canadian debtor.
3 And let's take a step back. Remember what the whole
4 premises here, don't listen to him he's going to be paid by
5 anyway. Well, who is he going to be paid by? He's going
6 to be paid by the Canadian debtor, of course. So if I'm
7 going to be paid by the Canadian debtor, and what I'm
8 supposed to take is that I'll probably, for present
9 purposes, as I will certainly be paid. I'm going to be
10 paid by the Canadian debtor so my guarantees in the US
11 don't matter, so don't worry if you're cancelling all those
12 other superfluous claims in the US.

13 Okay. Let's follow that reasoning. That
14 tells me that I have no claim in the US that is ever going
15 to be adjudicated on and result in a payment. So why again
16 would I be walking down there to get my claim against the
17 Canadian debtor on the premise of the claim resolved in the
18 court of the guarantor, when the whole premise of this
19 exercise is the guarantor is never going to pay me a red
20 cent.

21 Since the premise of your doing all this is
22 the guarantor not going to pay, then why am I in front of
23 the guarantor's court? In fact, why am I in the U.S.
24 Bankruptcy Court at all? Because it's not a bankruptcy
25 matter, it's a matter of New York law which is supposed to

1 be the superior court or whatever is down there. That
2 doesn't make any sense.

3 But under the CCAA you just can't do it.
4 There's no basis in law to do it. The only basis offered
5 up is that it's governed my New York law. And as I just
6 mentioned to you, lots of things are, including the
7 settlement agreement. And the logic of that proposition
8 would be that as long as you sign this order you're
9 pointless, because the settlement agreement is governed by
10 New York law, so you better sit down to and let everything
11 else happen somewhere else.

12 That's not the case. That's not right.
13 And, again, this is one of those things grafted onto the
14 back of a locomotive that they sent off down the hill
15 saying there's so many wheels in this thing that nobody can
16 possibly stop it. I'm standing up and saying you can't do
17 that. And if the price is I'm going to have to make you do
18 it again, we'll pay that price. We're saying, as drafted,
19 we can't stand for the settlement agreement. It's really
20 close. It's really close, but whether you negotiate in
21 front of a mirror and not by talking to the effective
22 parties these things happen. And I submit, with regret,
23 that the only thing for you to do here is to recognize the
24 fact that we are very close, but to tell them to go and
25 take it over the line.

1 There's a couple, just while I'm on the
2 subject of the order I want to point out what I think are
3 two Trojan horses in there. Paragraph 32 of the US order,
4 and 23 of the Canadian order. Paragraph 32 of the US order
5 says, "all relief contemplated by the settlement agreement
6 is hereby granted." Well what does that mean? Because I
7 have the settlement agreement. I have a very lengthy order
8 that's implementing various bits and pieces of it, but then
9 I have this one paragraph that says in case we forgot
10 something this implements it anyway.

11 JUSTICE ROMAINE: I'm sorry, I'm having
12 trouble getting my hands on the Canadian order, Mr. Dunphy.

13 MR. DUNPHY: Well, the Canadian order I
14 only have one copy of it.

15 JUSTICE ROMAINE: No, I have a copy of it
16 right here. What paragraph is it?

17 MR. DUNPHY: In the US order, it's in the
18 column dated July 20. It's right at the very back.
19 Unfortunately I have no tabs in mine; it's the very last
20 pages.

21 JUSTICE ROMAINE: Okay. And you are
22 looking at what paragraph?

23 MR. DUNPHY: I'm looking at paragraph 32
24 which is on page 14 of mine at the back.

25 JUSTICE ROMAINE: Okay, thank you.

1 MR. DUNPHY: And paragraph 32 says, the
2 failure to mention any provision of the settlement in the
3 settlement agreement are accrued in all the steps -- in all
4 that is contemplated by the settlement, the ULC1
5 settlement, the settlement agreement is hereby granted. So
6 in case we forgot something, everything else is swept in
7 here. That's just a Trojan horse. If it means nothing
8 then I would submit it goes. If it means something I would
9 very much like someone to tell me exactly what it means.

10 And to the same effect, slightly different,
11 is an arguably bigger Trojan horse, which is the
12 paragraph -- the paragraph over here. I don't have the
13 tab. In the Canadian order we have a paragraph that
14 approves the monitor's report that admits. I don't mind
15 approving the activities of the monitor, we haven't done it
16 in prior attendances, but I'll do it every day if that
17 makes people happy.

18 I don't take issue with the activities of
19 the monitor, but the monitor's report is a breathtaking
20 rendition of a lot of things that have happened. And I
21 don't want to be arguing at some future court at some
22 future day as to what is implicitly meant by a blanket
23 approval of the monitor's approval report. His activities,
24 I don't have a problem with, but I'm not in favor of a
25 Trojan horse that I don't understand.

1 I've dealt with the subject of an escrow;
2 as I said, an escrow is not the same as being paid. I
3 don't know that I'm the only one entitled to the funds
4 that's in there. I do know when it's paid to me, pursuant
5 to Article 7 of the trust indenture, which I'll take to you
6 in a moment, so I don't want to go there. So let me take
7 you to Article 7 and my suggested resolution, and I'll
8 finish with this, because we are done here.

9 Page 32 of the trust indenture, Article 7,
10 and you'll see that under 7.1, for example, if all
11 outstanding securities of a series become due and payable,
12 you can deposit the money with the trustee. If you want to
13 prepay there's provisions to do that too. I say that
14 because I'm told that the holders of my bonds may be in the
15 process of withdrawing the automatic acceleration of their
16 series. It doesn't matter. Even if they do, you've got
17 another provision where you can repay it.

18 So they have provisions where you can repay
19 it. And under this provision, anything leftover goes to
20 the company, and it says it in a couple of places. And let
21 me find you one; 7.6, for example. They can ask for any
22 excess that we are holding and the return of it. So I'm a
23 trustee. You get the simplest way to do it, and I'll read
24 you my language at the end, because I am finished, is
25 instead of having my claims being compromised, instead of

1 having provisions that say my claim is fixed at dollars
2 bullet when I don't agree with the number, none of that is
3 necessary. All they needed to do, and all they still need
4 to do is exactly two paragraphs.

5 Number one, upon payment in full of all
6 amounts owing to the US -- under the ULC2 trust indenture
7 pursuant to Article 7 thereof, all claims filed by the ULC2
8 trustee in the US proceedings or Canadian proceedings shall
9 be withdrawn or satisfied. Common sense. I submit it
10 follows law anyway, but if someone needs the comfort of
11 knowing it's in an order, I'm happy to have that in the
12 order.

13 Paragraph 2, the court shall stand seized
14 to provide ULC2 and its trustee with advise and directions
15 regarding the amounts to be paid pursuant to Article 7,
16 proving that this court may, in its discretion, hold a
17 joint hearing. We're done. That takes care of all my
18 issues; all of them not, just some, all of them.

19 And with that hopefully simple submission,
20 I will thank you for your time, and your Honor as well,
21 thank you.

22 JUSTICE ROMAINE: Thank you, Mr. Dunphy.

23 Mr. Linder?

24 A VOICE: Mr. Linder is not here. Ms.
25 Bossio will be presenting the matter.

1 JUSTICE ROMAINE: Okay, Ms. Bossio, go
2 ahead.

3 MS. BOSSIO: Good afternoon, My Lady. Good
4 afternoon, your Honor. My name is Emi Bossio and we are
5 counsel for the Calpine -- excuse me, for Calpine Power
6 L.P., which is also referred to as the fund. CLP and the
7 fund is a massive creditor in this CCAA application, My
8 Lady. It has over 483 million dollars in claims, and this
9 morning My Lady reserved a judgment on whether or not there
10 will be an additional proof of claim allowed for an extra
11 30 million dollars.

12 Of those claims, at least 142 million
13 dollars has been acknowledged and admitted by the monitor
14 of the Canadian debtor with respect to the CLP's toll rate
15 claim.

16 CLP is a creditor of CESCO and of CCEL.
17 The monitor's report identifies that the creditors of those
18 companies are at most risk of shortfall. And in
19 particular, My Lady and your Honor, I take you to the
20 monitor's report at paragraph 28, page 12. And this is the
21 chart where the monitor summarizes perspective recoveries
22 underneath the proposed settlement agreement. And what is
23 particularly important about this chart from the
24 perspective to CLP is, first of all, that on a low scenario
25 there's a risk for CESCO creditors, that's CLP's 378

1 million dollars, of a 65 percent recovery.

2 And if we look above there with respect to
3 CCEL, we see that even on the high recovery scenario,
4 CCEL's creditors, of which CLP is the single largest
5 creditor, will recover 65 pursuant to settlement agreement.
6 On a low recovery it's a 35 percent figure, My Lady. And
7 this is critical because CLP is a significant, indeed
8 massive creditor of the CCAA applicants. If we turn first
9 to its claims with CCEL, CLP has two claims already into
10 CCEL and the third which was dealt with this morning.

11 The first claim is with respect to an
12 contractual indemnity owed by CCEL in its role as manager
13 of CLP's assets. That is what's called the heat rate
14 claim. And the current claim has been valued by CLP at
15 over 115 million dollars. The second claim relates to a
16 potential penalty that is payable by D.C. Hydro, and that
17 amount has not yet been quantified. And the third claim
18 relates to a recently filed statement of claim by the
19 Canadian Power Developers Group, Inc. which was filed in
20 May, and for which relief was sought this morning to file
21 an additional proof of claims into CCEL in the amount of 30
22 million dollars.

23 Pursuant to monitor's analyses CCEL's
24 creditors, on the high scenario, this is their best case
25 scenario, would receive 65 percent of their claims. With

1 respect to the heat ray claim alone, that relates to a 35
2 percent recovery on the low scenario. That results in a
3 shortfall to CLP of between 40 million to 74 million
4 dollars, My Lady. If the lead is granted with respect to
5 the claim arising from the statement of claim filed by
6 CPDG, then that shortfall would be in the range of an
7 additional 10.5 to 19.5 million dollars.

8 With respect to CLP's claims into CESCA,
9 that claims arises as a result of what is referred to as
10 the toll claim. That was the repudiation by CESCA of a 20
11 years tolling agreement with CLP. Heat monitor and the CCA
12 debtors have acknowledged that at least 142 million dollars
13 is owing to CLP pursuant to that claim. Pursuant to its
14 dispute note, CLP values that claim at over 378 million
15 dollars. Therefore, even the smallest percentage or risk
16 to shortfall in CESCA, My Lady and your Honor, could
17 translate into an extremely significant shortfall.

18 JUSTICE ROMAINE: This is all, of course,
19 prior to the operation of the US debtor's guarantees, Ms.
20 Bossio?

21 MS. BOSSIO: That's correct.

22 JUSTICE ROMAINE: And in fact your client,
23 if in fact the US guarantees are taken into account, would
24 not suffer a shortfall; is that right?

25 MS. BOSSIO: My Lady, you bring me to my

1 very next point.

2 There are two issues that I would like to
3 raise with respect to the guarantee. First of all, the
4 claim that addresses the late filed proof of claim, that
5 was dealt with this morning. That, as far as CLP is aware,
6 is not a claim that would be guaranteed by the United
7 States debtors.

8 JUSTICE ROMAINE: Right.

9 MS. BOSSIO: And as a result, any shortfall
10 in that claim, the entire claim has to be satisfied within
11 the Canadian estates, there would be no recourse in that
12 claim to the United States. So on the monitor's own
13 numbers, there is potentially a 10 million to 19 million
14 dollar shortfall.

15 Then with respect to the guarantee, the
16 difficulty with the recourse to the guarantee, My Lady, is
17 that as we understand it the recourse is proposed to be
18 paid by way of equity in the US guarantor. And first of
19 all, obviously, My Lady, that in and of itself is a
20 compromise of CLP's rights. And with it, in particular, we
21 have difficulties because there is delay associated with
22 the resolution of that guarantee issues, but more
23 fundamentally there is risk associated with the payment of
24 the amounts owing under the guaranteed claims.

25 And specifically, the monitor's report and

1 the CCAA and US debtors settlement are premised on a very
2 fundamental assumption. We've heard the reference to CLP
3 being paid in full, but that assumes that equity is
4 equivalent to cash, My Lady, and that, in our submission,
5 is a flawed assumption. It is not always the case. In
6 particular, there is risk associated with equity, and it is
7 a compromise of the claim to pay a creditor other than in
8 cash. And that's particularly problematic here, where we
9 have Canadian cash assets that are flowing out of the
10 Canadian estate and going into the US estate.

11 And it's flawed to assume, My Lady, that
12 payment in equity equates to full payment, or that it
13 equates to -- it can't relate to payment at all. I'm
14 certain the shareholders of Enron assumed that their equity
15 was as good as cash, or at least would have some cash
16 value. That is not always the case. And that takes us to
17 the fundamental problem with the settlement agreement, and
18 that is that it places the risk on the Canadian creditors,
19 and in particular on CLP. CLP has the risks of the
20 shortfalls, while the certainty is flowing up through to
21 the US equity holders.

22 And it's not for the US debtors and the
23 Canadian debtors to ascribe that list to CLP, in fact in
24 our submission they cannot. They cannot compromise our
25 claims, they cannot import risk to our claims. Those are

1 not matters that can be unilaterally imposed. The
2 determination to impose shares as a payment on a creditor,
3 that may well be acceptable to a creditor, but it may not,
4 and I will involves risks. And those risks and that
5 determination is a compromise of the creditor's claim.

6 And as a compromise of the creditor's
7 claim, My Lady, that takes us to the fundamental legal
8 question, which is, given that there are clearly
9 compromises to CLP's claims being proposed, the monitor has
10 acknowledged on a high recovery under CCEL, there is a 65
11 percent recovery. What jurisdiction is it in the debtors
12 to agree to compromise that claim, and what jurisdiction or
13 discretion is there that exist in this court to approve
14 that settlement agreement which would have the effect of
15 affecting a compromise on to CLP.

16 My Lady, it is clear that there is no
17 jurisdiction, and it's simply not recognized as law that
18 debtors can agree and unilaterally compromise the claims of
19 their creditors. Compromises may occur under Canadian law,
20 but they must occur under the statute that allows that,
21 which is the Companies' Creditors Arrangement Act, which we
22 are under today, My Lady. There is not, and it cannot be
23 the case in Canadian law that debtors can unilaterally
24 compromise the claim of their creditors, nor can a
25 settlement bind non parties. But that's what's purported

1 to occur here. The CCAA attempts to achieve -- does
2 achieve in our submission...

3 (loud background noise)

4 JUSTICE ROMAINE: The microphone is very
5 delicate. We seem to be getting some feedback from the
6 telephone and would I ask you to please mute your side of
7 the telephone call. Thank you.

8 I'm sorry. Go ahead, Ms. Bossio.

9 MS. BOSSIO: The CCAA, through its
10 structure and through its framework, provides for a very
11 delicate balancing of the rights of creditors and the
12 rights of debtors.

13 Even though there has been much judicial
14 comments on inherent jurisdiction and flexibilities needed
15 in though process, no amount of flexibility and no amount
16 of inherent jurisdiction can overrule the express
17 requirements of that statute. And those express
18 requirements are set out through the operation of Section 4
19 and Section 6. My friends have taken you through that and
20 I won't do that again, but one thing that's very critical
21 about Section 6, My Lady, is that Section 6 deals with the
22 ability of the court to approve a compromise. And it
23 doesn't speak only of plans of arrangement, but Section 6
24 expressly speaks of any compromise that is to be approved,
25 My Lady.

1 The Canadian courts, and in particular our
2 court of appeals master had held that there's no discretion
3 in the courts to approve a compromise of creditors unless
4 and until that has been put to a vote of the creditors.

5 JUSTICE ROMAINE: But specifically, the
6 court held that is the court has no discretion to sanction
7 a plan unless it's been approved, Ms. Bossio; is that
8 correct?

9 MS. BOSSIO: That is correct. But in this
10 case, My Lady, if you have a settlement agreement that has
11 a compromised or plan that has a compromise, in my
12 submission you cannot do indirectly, or through naming
13 something completely different than a plan, achieve what
14 you could not achieve through the statute. It's an
15 indirect and an inappropriate intervention of the statute.

16 One of the difficulties, and what
17 distinguishes the circumstances of a compromise of
18 creditors' rights that we have in this case through some of
19 the authorities that my friends have cited to you that the
20 involve the sale of assets, is that in those circumstances
21 the courts have been very clear about the need to determine
22 to a very open process, a process that ensures that all the
23 creditors understand what is going forward, that there's an
24 open process in the market, so that the best price for the
25 assets can be determined, and that it be transparent so

1 that creditors can ascertain that the best price is being
2 accomplished.

3 What is troubling about this case, My Lady,
4 is that the settlement agreement settles numerous
5 intercompany claims, and those are settled on the basis
6 which creditors have no knowledge and have no
7 understanding. The intercompany claims have been
8 unascertained, undetermined. They are uncertain claims.
9 And so, as a creditor, we are left without the process,
10 without the transparency of understanding whether or not,
11 in fact, those intercompany claims have been dealt within a
12 way that's fair to creditors.

13 And in our submission one of the reasons
14 why creditors are given the right to vote, and should not
15 be stripped of the right to vote, is because it forces that
16 accountability on the plan, and it forces that
17 accountability on any compromise. And that's what's
18 lacking here, My Lady.

19 In summary, My Lady, CLP's claims are
20 significant, and they are at clear risk, according to the
21 monitor's assessment of the settlement agreement,
22 particularly the claims of CCEL will be compromised at 65
23 percent.

24 JUSTICE ROMAINE: Ms. Bossio, isn't the
25 monitor saying that there is very little risk to the fund,

1 in fact?

2 MS. BOSSIO: It relies on that, as I
3 understand that report, on an assumption that the
4 guarantees will be available and will be paid. But again,
5 that relies on the fundamental assumption, first of all,
6 that equity does equate to cash, which is not the case.
7 And secondly, it does not acknowledge the fact that payment
8 in equity is in itself a compromise of a creditor's claim.
9 It can be -- a debtor cannot unilaterally impose the
10 determination that a claim will be paid by equity. It
11 cannot simply determine that and impose it upon a creditor
12 without the creditor's consent, or in the CCAA context,
13 without a vote of the creditor. And that is simply where
14 the fundamental problem with the settlement agreement lies,
15 My Lady.

16 In sum, CLP has a statutory right to vote
17 on a compromise of its claims. The settlement agreement
18 does purport to compromise those claims, and on that basis
19 alone, it's a legal threshold issue that the court, in our
20 respectful submission, lacks the jurisdiction and lacks the
21 discretion to approve a settlement to which CLP is not a
22 party, to which it has not given its consent, and which is
23 compromises its claims.

24 JUSTICE ROMAINE: Thank you, Ms. Bossio.

25 Is there anyone else here that wishes to

1 speak?

2 Judge Lifland, I recall that one of your
3 counsel in the United States, I think it was Mr.
4 Fredericks, wanted to address this after the Canadian
5 creditors had addressed it?

6 Do you want to deal with that?

7 JUDGE LIFLAND: If Mr. Fredericks --

8 MR. FREDERICKS: I'll be very brief, your
9 Honor. If I may just say I that I adopt Mr. Dunphy's
10 arguments. And for the reasons that he stated, and in
11 particular by reason that paragraphs 5 and 16 of the US
12 order propert to dismiss and withdraw, deal with our claims
13 prior to their payment, that this court should decline to
14 approve the settlement at this time.

15 Thank you your Honor. Thank you Madame
16 Justice.

17 JUSTICE ROMAINE: Thank you.

18 Okay then. Mr. Meyers?

19 MR. MEYERS: Thank you, My Lady, your
20 Honor. I'm cognizant of the time, and I'll try to be very
21 brief. In trying to assist Judge Lifland to understand
22 what the CCRC committee, Mr. Thornton analogized himself to
23 an official creditors' committee. I've seen official
24 creditors' committees, and that's not one.

25 MR. DUNPHY: Thank you.

1 JUSTICE ROMAINE: Excuse me, if you could
2 hold on. Madam clerk, if you could turn down the sound
3 again? Thank you.

4 Mr. Meyers, go ahead.

5 MR. MEYERS: CCRC is an ad hoc committee
6 made up primarily of Harbor and ULC2 note holders, and we
7 only know much about it because of the disclosure that it
8 made in the United States, not even to this court today.
9 But one of the things that makes a difference is there are
10 things official creditors committees won't do. For
11 example, if I can just read a line from a case, "The burden
12 is upon Harbor to satisfy me to that they are entitled to
13 the relief claim. And the circumstances of this case they
14 have not fulfilled its burden, and the application for
15 relief is hereby dismissed." That's the decision of Madame
16 Justice Smith in the oppression remedy in Nova Scotia that
17 Harbor lost.

18 It sounded like -- I was probably wrong
19 but, it sounded like Mr. Thornton was saying that his
20 client won that case. Now the trustee won, the trustee for
21 the note holders won for a small portion of the note
22 holders who had not bought into the oppression, and the
23 debtors were ordered to hold up about 50 million dollars.
24 Instead today the ULC2 note holders are getting paid in
25 full.

1 But it goes beyond that, Mr. Thornton then
2 said his claim for costs is being compromised, part of his
3 claim for costs, having not won the litigation, having then
4 brought the derivative action that was tossed out similarly,
5 his costs are being compromised, he said in Schedule G, and
6 he referred you to paragraph 9 of the order. It says how
7 dare they compromise my --

8 MR. THORNTON: I did not make that
9 submission, My Lady, that was the trustee's claims for
10 oppression that were being dismissed in Schedule G.

11 JUSTICE ROMAINE: That may be, Mr. Meyers.
12 Go ahead.

13 MR. MEYERS: The claims were tossed and not
14 on the schedule. The trustee's claims against ULC2 are not
15 being released at all. The oppression claim is, as a
16 trustee as Mr. Dunphy rightly said, can only claim a
17 hundred cents on the dollar, including everything that is
18 made up in the hundred cents on the dollar, and that's
19 what's being paid. But the suggestion that Harbor won the
20 Nova Scotia litigation, that it has an entitlement to costs
21 that's being released in this proceeding and therefore is
22 subject to compromise, is simply not the facts.

23 Mr. Thornton questioned the urgency of
24 this. Incredible coming from the party who's been
25 distracting this pound of flesh throughout. But in

1 addition to market risks, foreign exchange risks, there's
2 three million reasons per month of interest accrual under
3 the ULC2 notes that continues; not to mention the need to
4 avoid the paralysis that has characterized some of the
5 proceedings because of the difficult issues between the
6 cross-border estates.

7 The global settlement agreement is not a
8 plan of compromise. It's an asset realization, principally
9 among the debtors. And the big lie, the big -- that kept
10 coming from all of my friends this afternoon, and I
11 don't -- I'm sorry, that's a terrible, terrible phrase. I
12 don't mean any intention.

13 JUSTICE ROMAINE: Okay.

14 MR. MEYERS: The error that is common to
15 all of their submissions is that they put themselves in the
16 positions of debtor companies. Mr. Thornton says our
17 claims up into Quintana are being compromised. The fund is
18 creditor of CESCA. The fund is not a creditor of Quintana
19 CCEL might be, CCEL might be; CCEL is a debtor, it's not a
20 final. All claims are recognized as being paid in full or
21 not being touched, not being compromised.

22 Mr. Thornton says in paragraph 34 of his
23 brief that if its established that the settlement can be
24 implement such that all CESCA creditors will recover a
25 hundred percent of their valid claims from the Canadian

1 estates, then implementation of the settlement would not,
2 at this point, effect a compromise of CESCA's creditor
3 claims. There's no compromise if you are paid a hundred
4 percent. The fact that asset realization may not yield a
5 hundred cent recovery is not a compromise.

6 These creditors have bought into companies
7 that don't necessarily have the ability to pay them in
8 full. We are going to realize the assets. If we realized
9 only 10 cents worth of assets, that's still not a
10 compromise. What is a compromise is when we come to them
11 and say we want to satisfy your claims for 10 cents. We
12 are not asking to satisfy their claims today. There may
13 never be the need for a plan because we hope they are going
14 to be paid in full. We going to see what happens with the
15 bond sale. We are going to see what happens with the toll
16 claim. There may never be a compromise, but if there is
17 one, there will surely be a plan on which they vote.

18 But all Justice Blair said in Philips is
19 you can't compromise claims in a case without a plan. And
20 Philips was such a different case. In that case there was
21 a Canadian debtor who also filed in the US. So it was a
22 Canadian debtor who proposes a plan of arrangement under
23 the CCAA. And in it it says you, Canadian creditor, go to
24 the US. It threw a Canadian creditor out of Canada and
25 into a US class that was subject to a cramdown.

1 And we've heard the term cramdown used
2 rather loosely today. Cramdown, as I understand it, and I
3 don't pretend to be an expert on, is a particular section
4 or sections of the US Bankruptcy Code that all plan to be
5 approved even if creditors may opposed. There is no
6 cramdown here, nobody is being crammed down in any kind of
7 sense. I doubt anyone was told that you're being thrown
8 into the United States and you are subject to a proceeding
9 that doesn't treat you as well as a Canadian proceeding.
10 All Justice Blair said is that you can't have a Canadian
11 plan for Canadian debtor and not let the Canadian creditors
12 vote on it if you are going to subject it to a worse
13 treatment somewhere else. And that is not what's happening
14 here.

15 And I have an unfortunate confession to
16 make as well, it's an Ontario, and as much as I respect
17 Justice Blair, it might not settle the law for the whole
18 country. It could be that My Lady thinks something
19 different, but in any event it has nothing to do with this
20 case, because by settling the intercompany relations among
21 the debtors and their US affiliates, no claim of the funds,
22 no claim of anyones' is being compromised unless it's being
23 paid in full, and in that case, of course, it's not a
24 compromise.

25 So that having the US jurisdiction

1 determine a claim that has a forum of Canadians, it's not a
2 compromise. Settling the Greenfield litigation, Mr.
3 Thornton said it was a compromise. It's a settlement of a
4 case by our client against another client. It's not a
5 compromise of a creditor's claim, it's a settlement. In
6 Red Cross, also written by Justice Blair, the same judge
7 that wrote Philip, well aware of the difference between
8 Section 11 and Section 4, Section 6 of the CCAA, Justice
9 Blair made it clear that you can't realize on assets and
10 use the court's authority either the discretionary power to
11 stay under Section 11, which includes an injunction to deal
12 with assets realization, or inherent jurisdiction in order
13 to reorganize affairs among the creditor's positions and
14 realize on assets.

15 In Air Canada the restructuring agreement
16 that was approved included a cross collateralization of DIP
17 priority, a priority determination that cost 22 million
18 dollars to the creditors. Mr. Thornton said it was
19 nothing, it's all just GE, it gave it priority. One of the
20 things he complains about in this case is there's a
21 priority determination, well that's what was done in Air
22 Canada.

23 In Stelco the pension funding agreements
24 set Stelco's obligations in the future, how much it had to
25 pay, because a priority is deemed trust in future,

1 perfected creditor realization, because there would only be
2 so much value left to give to the creditors. As long as a
3 transaction is fair and reasonable and does not compromise
4 the creditors' claims, the court has jurisdiction to do it.

5 I want to deal very briefly with something
6 that Mr. Thornton said about the notice of revisions, that
7 this is somehow a collateral attack on what was done April
8 4th, because it's nothing of the sort. Ms. Bossio tried to
9 say that the debtors have admitted the claims and no
10 supervisions. Of course that's nothing as far as I know
11 of, we've set an amount of value that we would be prepared
12 to have claims accepted at had there been no notice of
13 dispute filed.

14 And the whole issue on April 4th was we
15 were in an early stage where the notice of revisions had
16 been sent, but no notice of dispute yet, and it's the
17 notice of dispute that triggered the judicial phase, the
18 judicial determination phase. And in our submission, the
19 fund is simply the author of its own misfortune. It had
20 the opportunity to deal with us at that time, instead it
21 filed a notice of dispute which results in standing for
22 guarantors. We talked about that on April 4th. That if
23 they said that -- I said in particular on April 4th, if he
24 delivers is notice of dispute and we have to bring a
25 motion, Mr. Griffin will have all of his ability at that

1 point to state his client's peace, and hopefully at that
2 point they will have said they are a guarantor.

3 It was clear on April 4th, once we went
4 into the court proceeding, that the US would come into the
5 process. And, in fact, My Lady, if I could just quote from
6 your reasons, on balance I think I'm inclined to dismiss
7 the application, that was Mr. Griffin's application
8 opposing the notice of revision. I believe the claims
9 process should continue as it has continued, and that does
10 preclude, of course, any kind of agreement between the US
11 debtors and the Canadian debtors with respect to US
12 standing with respect to these issues. There's no
13 collateral attack on the claims procedures order. It was
14 always intended, and right in your endorsement, that if we
15 got to the judicial phase if they couldn't settle with us,
16 then there was going to have to be an assessments of
17 standing.

18 Mr. Dunphy's submissions reflect the
19 unfortunate rigidity of the position of a trustee that we
20 saw in the US with ULC1 trustee, and Mr. Dunphy didn't make
21 quibble about it. He has one thing he can do. Well, he's
22 going to be paid in full. He looks at paragraphs 21 and 25
23 of the order and says why are they assessing the amount of
24 my claim? What is it they are holding for me? Well, 21
25 cents is the amount that we admit, we agreed we owe him.

1 And 25 is a court order that we shall establish and fund,
2 as appropriate with consent of the monitor and escrow
3 account or other reserve, for the payment of such amounts
4 to the extent they are disputed. Well, My Lady is going to
5 order us to establish an escrow in the amount disputed, and
6 we've agreed on all those amounts.

7 So my submission, apart from being the
8 least practical entities involved in these proceeding, the
9 -- sorry.

10 (loud background noise)

11 JUSTICE ROMAINE: That's okay, Mr. Meyers.

12 MR. MEYERS: The submissions of the trustee
13 are not correct and not an appropriate response.

14 Then he said why do you have to dismiss
15 some of my claims before I'm paid in full? And the answer
16 is sitting in the monitor's report. It's the rock and the
17 hard place we've had through these proceedings. Everybody
18 claims everywhere. Markers all over the place. The
19 monitor says when you drill down and get to who really owes
20 what to who and you flow the money this way it works. But
21 I can't flow the money until the other claims against those
22 debtors are gone so that we know where the money is going.
23 So as long as there's a practical assurance, an assurance
24 satisfy to My Lady that's fair and reasonable, and to your
25 Honor, as long as there is a practical assurance that these

1 funds are going to be paid, we have to take the other
2 claims out of the way in order to create the flow for the
3 waterfall to come, otherwise it's a chicken and egg, he can
4 never be satisfied because no claims can ever go away until
5 you're paid, and we can't be paid until the claims go away.
6 So it's about five years of litigation instead.

7 Well, what happens if the CCAA debtors
8 change something? My Lady, they will be here in a flash.
9 And if we've change something before we've committed to
10 you, put in this voluminous material, with the monitor
11 watching every step, everyone will understand what the
12 relief available to it is.

13 As to the referral to the US, just a brief
14 point that Sections 18.6 sub 2 and sub 4 give you ample
15 jurisdiction. They are not trumped by Section 12 or 4 of
16 the sections in the statute, if anything Sections 18.6 and
17 4 are even more specific, and the later. Many claims have
18 had Canadian claims to go to the US and US claims go to
19 Canada for resolution. In our case the US debtors,
20 guaranteed claims which are American claims against an
21 American debtor are coming here? It's an example of comedy
22 at its best to settle.

23 Subject to my Lady's questions or if your
24 Honor has any questions, those are my submission.

25 JUSTICE ROMAINE: Mr. Meyers, I have just

1 one question, and that is there seems to be a difference
2 between the Canadian order and the US order with respect to
3 the release of the oppression claims and how that will
4 work. Am I missing something? Is there an --

5 MR. MEYERS: I had understood during the
6 break --

7 JUSTICE ROMAINE: -- a resolution?

8 MR. MEYERS: -- that there was a discussion
9 with the US. I don't know if Mr. Seligman could answer it.

10 JUSTICE ROMAINE: Perhaps Mr. Seligman
11 could answer it.

12 MR. MEYERS: Perhaps we can take one moment
13 to look into the issue of that.

14 JUSTICE ROMAINE: Adjourned.

15 Go ahead, Judge Lifland.

16 JUDGE LIFLAND: Go ahead, Mr. Seligman, if
17 you can respond.

18 MR. SELIGMAN: We are in the process, your
19 Honor, of revising the order to try to account for the
20 ULC1's hopefully resolution. I believe we are trying to
21 pick up that change there. I just do need to confirm it,
22 but the idea is that they should be completely conforming,
23 so we'll have to just double check it. But if there's any
24 disparity, there shouldn't be.

25 JUDGE LIFLAND: Well, you are talking about

1 now only about the ULC1 potential settlement. What Madam
2 Justice Romaine and I are concerned about is that the
3 orders, assuming that the settlements are approved, are
4 parallel in every respect and do not diverge so that
5 stakeholders have different outcomes depending upon their
6 participation in the orders.

7 MR. SELIGMAN: Your Honor, there shouldn't
8 be. We are just double checking it, but I can represent
9 that the intent is that the orders are exact, and we will
10 go back and comb through the order and double check that
11 all the cross references are the same, but they should be
12 identical. That was the principal when we were drafting
13 the proposed orders.

14 JUDGE LIFLAND: The point that's being made
15 is will the revised order capture the impression that there
16 are different outcomes based upon the way the orders are
17 now?

18 MR. SELIGMAN: Yes. We are in the process
19 of revising them and that we will fix those, to the extent
20 there's any discrepancy, and make sure that the orders are
21 exactly the same in both jurisdictions. And we will have
22 revised orders that we will make sure to hand up and we
23 will have red lines that shows those corrections.

24 JUSTICE ROMAINE: Okay. Judge Lifland, I'm
25 sorry we are having problems hearing you. I get the gist

1 of what your questions were from Mr. Seligman's answers.

2 But could I perhaps ask, Mr. Seligman, is
3 the intention that the Canadian order provisions will be
4 the ones that apply here, or is that still under
5 discussion?

6 MR. SELIGMAN: I apologize, but I just have
7 to double checks the cross references, but they should be
8 identical in both jurisdictions. So perhaps I can report
9 back to the court on that in a moment, but I just do need
10 to double check, but they should be exactly the same. I
11 just don't have the latest version of the order right here
12 at counsel's table.

13 JUSTICE ROMAINE: Okay.

14 MR. THORNTON: Thornton, initial R.

15 My friend, Mr. Meyers, had mentioned that I
16 misstated something in the Air Canada case. I want to
17 clarify that less there be any doubt about that. And, in
18 fact, I believe that Mr. Meyers is in error that the cross
19 collateralization in the Air Canada case for certain
20 aircraft leases in fact was imposed as part of the DIP
21 order earlier on in the piece. When the large
22 restructuring agreement was put in place there was a
23 further cross collateralization which came into effect upon
24 implementation which was after the exit and after the vote.

25 JUSTICE ROMAINE: Thank you.

1 MR. MEYERS: I might have --

2 JUSTICE ROMAINE: Okay. Mr. Gorman?

3 MR. GORMAN: Yes, my Land and your Honor,
4 it's Howard Gorman of the ULC1 creditor's committee.

5 I think part of the problem here is the
6 settlement agreement which largely resolves intercompany
7 claims like intercompany assets. We didn't have a
8 creditors vote when we went to sell the ULC1 bonds that
9 were held by the CCRC. We had court application. We've
10 had argument. We've had court determination. Similarly,
11 when the B units were sold, it ended up virtually dealing
12 with all of the assets in common, we don't have a creditors
13 vote then, we have the court direction. The end result is
14 you get the assets, the monitor puts together a
15 distribution amount, and you then have the ranges.

16 If we had a warehouse that sold for a
17 million dollars, the monitor would say we have between 3
18 and 5 million dollars in claims, that means if we sell the
19 warehouse a million dollars you'll get between 33 and 20
20 cents, we'll determine those claims in the future, and if
21 there's a shortfall, we'll have a vote; there's a
22 compromise at that time.

23 What the settlement agreement does is
24 realize the company's assets, and the monitor's report
25 where it says there is a shortfall isn't saying anything

1 more than when looking at the this as the court, as a party
2 looking at the agreement, what the potential outcome is,
3 depending upon how the claims are ultimately resolved.

4 When you hear Mr. Thornton's lists of
5 things that he thinks are being compromised, what
6 jurisdiction claims will be in, how -- from CLP, how they
7 are their shortfall is calculated, that's not anything we
8 get to vote on. They don't want my 2 billion votes
9 determining where to have their claims heard. They don't
10 want my 2 billion votes determining what their make whole
11 claim is worth. And that is why that is not a part of it,
12 that is a further step down the road, and that exactly
13 demonstrates why the settlement agreement is a realization
14 of the assets and it's a step forward to the end, it's not
15 the end. Thank you.

16 JUSTICE ROMAINE: Thank you.

17 Judge Lifland, I think we are now over to
18 you.

19 JUDGE LIFLAND: We have one remaining item,
20 and I'll hear from the parties. They have been attempting
21 to work out the objection to the settlement filed by HSBC,
22 which I think is the only remaining objection on the
23 merits, other than Mr. Eckstein's comments.

24 MR. SELIGMAN: Yes, your Honor. And just
25 to, I want to just clarify. We did pick up that

1 discrepancy between the orders, it was the timing of the
2 effect of the claim which was on schedule G. This was
3 paragraph 16 of the proposed US order, and at paragraph 5
4 which talks about the date of effectiveness of various
5 provisions. We have clarified that paragraph 16 is
6 effective upon a date the Canadian debtors and the US
7 debtors have executed and filed certificates with the court
8 advising that all the conditions in the settlement
9 agreement have either been waived or satisfied, et cetera
10 it's in paragraph 5. So that should now match with the
11 Canadian order.

12 MR. ECKSTEIN: Your Honor, excuse me can I
13 ask? I noticed that Mr. Seligman has drafts of the
14 modified order. I'm assuming I am going to have an
15 opportunity to at least get a copy of the order that's been
16 circulated?

17 JUDGE LIFLAND: That's a good assumption.

18 MR. ECKSTEIN: Thank you.

19 MR. SELIGMAN: Yes. Your Honor, I believe
20 we are -- if I can could just have one moment your Honor.

21 JUDGE LIFLAND: Maybe it's appropriate for
22 us to take a five minute recess while we see whether we
23 have a settlement or not.

24 MR. SELIGMAN: Your Honor, I believe we do,
25 but yes, a five minute recess just to confirm that would be

1 good.

2 JUDGE LIFLAND: Is that all right, My Lady?

3 JUSTICE ROMAINE: Yes, thank you. Five
4 minutes?

5 JUDGE LIFLAND: Yes.

6 THE CANADIAN CLERK: Order.

7 (Recess taken)

8 JUSTICE ROMAINE: The Calgary court is
9 ready when New York is.

10 MS. HEALY: We just need one moment,
11 please.

12 JUSTICE ROMAINE: Sure.

13 JUDGE LIFLAND: Remain seated.

14 Thank you all.

15 MR. SELIGMAN: Your Honor, David Seligman,
16 again, on behalf of the US debtors.

17 Your Honor I do believe we have a
18 settlement of the ULC1 trustee's objection. The debtors,
19 the ULC1 indentured trustee, as well as the ULC1 ad hoc
20 have agreed upon a revised form of order, as well as some
21 changes to the settlement agreement that would satisfy
22 their objection.

23 We have delivered those materials to the
24 Canadian debtors. They still need to look at those and
25 gave their signoff. I'm hopeful that we will get that,

1 because, again, it just deals with this parochial issues,
2 but we need to get their approval and consent. So we have
3 also submitted copies of the red line order in the
4 courtroom here for all the parties present.

5 So I feel good enough about where we are
6 that we don't have to proceed with their objection, and we
7 will work we the parties to see if we can come up with a
8 final version of the order and submit it to chambers once
9 we coordinate with Canadian debtors' counsel and get their
10 sign-off on the merit.

11 JUDGE LIFLAND: I don't exactly follow you,
12 Mr. Seligman. There's an objection on the record that's
13 not been withdrawn. It's subject to an approval. If I
14 hear that it's being withdrawn subject to a pending of that
15 approval, I can react to it.

16 MR. CASTELLO: Your Honor, Jeff Castello of
17 Kelley Drye and Warren for HSBC --

18 JUDGE LIFLAND: I can also tell you before
19 you finish that I'm prepared to rule if you can't resolve
20 it in your own way.

21 MR. CASTELLO: Thank you, your Honor. HSBC
22 is the indentured trustee under the indenture relating to
23 the ULC1 notes.

24 Subject to what I believe might be one
25 final nit that the Canadian attorneys are going to deal

1 with right now, we will withdraw the objection. And
2 hopefully by tomorrow we will submitted a proposed form of
3 order to the court that everybody has agreed on, if not
4 later on tonight.

5 JUDGE LIFLAND: Does anybody want to be
6 heard with respect to this conditional withdrawal of the
7 objection?

8 MR. ECKSTEIN: Your Honor, to the extent
9 the indentured trustee is going to withdraw his objection,
10 I'm assuming that does not effect any position that any
11 individual holder has with respect to the actions being
12 taken by the ad hoc committee. So to the extent the
13 individual holder is not --

14 JUDGE LIFLAND: That's the way I would
15 rule, Mr. Eckstein.

16 MR. ECKSTEIN: So to the extent the
17 individual holder is not participating, they are not bound
18 by the decision of the indentured trustee to give its
19 consent.

20 JUDGE LIFLAND: Yes. But I'll note that no
21 individual holder has filed any objection.

22 MR. ECKSTEIN: I appreciate that, your
23 Honor, but I don't think that there was an obligation
24 necessarily to file an objection or to be bound by the
25 action that's being taken.

1 MR. SELIGMAN: So with that, your Honor, I
2 believe their objection is withdrawn subject to finalizing
3 some language, which I don't believe we'll have any issues
4 with.

5 And with that, your Honor, we have nothing
6 more on behalf of the US debtors.

7 JUDGE LIFLAND: Very well. The objection
8 is considered withdrawn on a contingent basis subject to a
9 final approval.

10 JUSTICE ROMAINE: I'm sorry, Judge Lifland,
11 I believe Mr. Dunphy wishes to make some statement about
12 the order.

13 MR. DUNPHY: To clarify at least. Just to
14 be clear, we obviously haven't seen anything, so we're not
15 buying into the provisions. We've been told it's a whole
16 package deal, but packages change I guess. But anything
17 that effects us, I don't know, we haven't seen any changes
18 as accepting a pig and a poke, and the order is supposed to
19 be binding on everyone. So if there's something there to
20 be seen, I think everyone needs to see it and ascertain
21 whether it affects their position.

22 I can tell you that the truing up of the US
23 and Canadian orders only goes part of the way to addressing
24 the points I've raised. Our point being it's not enough to
25 promise to be paid, it is to be paid.

1 JUSTICE ROMAINE: I understand.

2 Mr. Robinson, can you help with the issue
3 of the changes?

4 MR. ROBINSON: I can, My Lady. For the
5 record Larry Robinson.

6 I understand from the folks in the
7 courtroom that there have been some revised order provision
8 of the proposed Canadian order sent up. It's being looked
9 at at the moment. And also a proposed revision to the
10 settlement agreement to deal with this American objection
11 issue.

12 I am feeling awkward here because I'm
13 standing discussing changes to an order when your Ladyship
14 and his Honor have not made a ruling on the applications
15 themselves. But were I to presume, and it's a presumption,
16 my partner, I apologize if it's an incorrect assumption, I
17 would presume that an order of the sort that we are seeking
18 were to be granted in Canada by your Ladyship, I think we
19 are a bit of time away from indicating to you what changes
20 might be needed to that form from the form that we
21 originally presented to you, all being driven out of this
22 accommodation in the ULC1 trustee's position.

23 I may have simply added to the confusion,
24 but I think that's where we are at the moment. I don't
25 know what your Ladyship's time is or his Honor's time is,

1 but I suspect where we are at is that the form of order is
2 not driving your decision making process, and I don't know
3 whether, were the applications to be granted, whether we
4 are within ten minutes or half an hour. I see some
5 nodding. I think we are probably within ten minutes to
6 half an hour of having a form of order to present to you,
7 and the other parties, obviously, that we believe is a
8 modification simply to address the one point that Mr.
9 Dunphy has addressed with -- I'm sorry, to address the one
10 objection by the ULC1 trustee. I think that's the status
11 at this point, your Ladyship. That is all.

12 MR. LANCE: My Lady, I may have something
13 to add to that.

14 JUSTICE ROMAINE: Mr. Lance?

15 MR. LANCE: For the record, I'm Canadian
16 counsel for the US ULC1 indentured trustee, and so I've
17 seen some of these orders that we've been working on all
18 day.

19 The changes, as far as we're concerned,
20 really address the liability issues to the indentured
21 trustee. I don't think anyone else is going to have that
22 much interest in them.

23 JUDGE LIFLAND: They are internal, as I
24 understand it.

25 MR. LANCE: We are close to finishing them.

1 JUSTICE ROMAINE: I'm sorry. Judge
2 Lifland?

3 JUDGE LIFLAND: Those issues, I think, are
4 very internal and parochial to the trustee, so I don't
5 think they go at all to the settlement. As a matter of
6 fact, however they compromise out and rework their issues,
7 I don't think there is anything that really goes to the
8 merits of the settlement.

9 MR. SELIGMAN: That's correct, your Honor.
10 If your Honor wishes I can take five, I can take one minute
11 and I can walk through, at least just for the benefit of
12 your Honor, the changes that we have made to the order.

13 JUDGE LIFLAND: That may be appropriate,
14 because I think it's really much ado about not very much at
15 all.

16 JUSTICE ROMAINE: Okay, thank you.

17 MR. SELIGMAN: So, I'll just walk through,
18 I'm looking at a red line here, which -- so I know everyone
19 in the US court has something to look at, but let me just
20 see if I can identify a couple of the changes, again they
21 are parochial.

22 For example, in recital G, on page 3, it
23 should be approximately page 3 of the form of the US
24 proposed order, at the end of the paragraph, and -- excuse
25 me just one second.

1 Your Honor, may I approach and just hand up
2 a copy to your Honor?

3 (Handing)

4 MR. SELIGMAN: In paragraph G, at the end
5 of the recital on page 3, we just added that the terms of
6 the settlement are embodied and memorialized in a
7 settlement agreement draft which was attached as Exhibit B
8 to the motion. So again, that just cross references the
9 settlement agreement itself.

10 On page 4 in paragraph L, there are
11 literally some changes to defined terms. For example,
12 capitalizing the word holders, referring to the approval
13 motions, just cross referencing in definitions that were in
14 the motions, so those, I think, are of no consequence.

15 There is a new paragraph M, as in Mary, on
16 page 4 which just recites that the holders of the majority
17 of the ULC1 bonds have directed the indentured trustee to
18 take certain actions, and those actions include withdrawal
19 of the objection, support of the settlement motion, and a
20 statement in support of the settlement at the settlement
21 hearing. Also adding provisions that if and when the order
22 should be entered, to execute and deliver the settlement
23 agreement on behalf of all holders of the ULC1 bonds and to
24 execute such other and further documents and to take such
25 further actions as the holders may direct the indentured

1 trustee to take.

2 Further, in paragraph 3 of the proposed
3 order at the bottom of my page 5, we changed the definition
4 of HSBC, and instead to refers to it as the indentured
5 trustee.

6 Paragraph 4 there are some changes to the
7 defined term ancillary documents because it had already
8 been defined earlier.

9 In paragraph 5, that was the conforming
10 change that I spoke about earlier. We have removed the
11 reference in the first line of paragraph 5 to paragraph 16.
12 That clears up the timing issue that I spoke to you about
13 before.

14 There are some other changes to those
15 paragraph numbers that basically account for the fact that
16 there are some changes in the order of the paragraphs and
17 numbers of the paragraphs in the order.

18 Moving on to page 8 in paragraph 11, there
19 are some clarification of the exculpation that it applies
20 both to the indentured trustee as well as its present and
21 former directors, officers and employees, et cetera, and
22 just clarifies the extent to which the exculpation applies
23 to the schedule. Instead of just causes of action, claims,
24 et cetera; it refers to causes of action, debts, demands,
25 judgments, et cetera; it's just the standard provisions

1 that you would expect to see in an exculpation.

2 The next is to paragraph 21 on my page 11.
3 That paragraph basically had an injunction with respect to
4 any claim or cause of action against the US trustee in
5 relation to the CCRC senior notes that also include the
6 indentured trustee.

7 There's a new paragraph 25 that's been
8 inserted on page 12 that basically copies and pastes
9 language from the settlement agreement, that's the
10 operative provision giving the ULC1 and the indentured
11 trustee the 3 and a half billion dollar claim against the
12 estate.

13 On page 16, paragraphs 35, 36, 37 and 38,
14 there is just a change to the defined term. We had
15 referred to the second lien committee, which was the ad hoc
16 committee of second lien holders in the US, instead we
17 refer to it as the Calpine second lien holders. That was a
18 cross reference to a cash collateral order, we were just
19 using the same definition. And that's just a defined term
20 issue that we needed to clarify.

21 And then there's a provision in paragraph
22 42, a new paragraph 42 on page 19, which states that any
23 future plan will incorporate this order in the settlement
24 agreement.

25 So again, I think that a lot of these

1 changes relate to the agreement between the US debtors, the
2 ULC1 indentured trustee, and the ad hoc committee with
3 respect to the direction of the ULC1 indentured trustee to
4 withdraw its objection and to sign off on settlement
5 agreement.

6 And again, we will circulate this to -- it
7 has been circulated to the Canadian debtors, just dealing
8 with electronic transmissions takes a little while for them
9 to get the latest version. They have seen interim versions
10 over the course of the hearing, but we understand that they
11 need to give their final sign-off. We hope that we are
12 able to get that. We do believe that we will get that.
13 And so we think that we can submit an order when we get
14 those issues clarified, which will hopefully be in the next
15 hour.

16 JUDGE LIFLAND: Very well.

17 JUSTICE ROMAINE: Thank you.

18 JUDGE LIFLAND: Consider the HSBC objection
19 withdrawn.

20 MR. ECKSTEIN: Your Honor, if I may, having
21 seen this for the first time, these changes, I do want to
22 make one or two observations for the record.

23 I do note paragraph M has the court making
24 a finding that a majority in the aggregate principal amount
25 of the ULC1 bonds is given a direction. We certainly

1 haven't seen any indication as to what amount of holdings
2 have participated in this process. We simply have a naked
3 finding that a majority have been given a direction. I
4 want note that the record is completely absent of any
5 indication that there's a majority.

6 Number two, I think it's significant
7 because paragraph 11 provides for a complete and
8 irrevocable indemnity and release of the trustee by all
9 holders. And to the extent there is going to be a release
10 with respect to all holders, including those who are not
11 participating in this direction, it's significant, your
12 Honor, to at least have some record and know that there are
13 in fact holders who are giving this direction and who they
14 are, because we don't have any record of that in this case.

15 Thirdly, your Honor, it does say with
16 respect to CCRC, which I think is more on the Canadian
17 side, and I am just curious about the use of the word in
18 paragraph 15, it says "In the event there's an entitlement
19 to accrued interest fees and the like that have not been
20 resolved," it says, "CCRC may establish a fund." I had
21 understood that they were going to establish a fund. And
22 it just seems curious to me that the order was using the
23 word may, when at a minimal, if this is going to proceed,
24 it should say that they will establish a funds. And I
25 would suggest that that modification be considered.

1 JUDGE LIFLAND: Take the last first.

2 MR. SELIGMAN: What's that?

3 JUDGE LIFLAND: Take the last observe
4 first.

5 MR. SELIGMAN: Well, your Honor, that's an
6 issue obviously for the Canadian debtors, but that's not
7 been a change in the proposed order it has always been that
8 way, so I think we can stand on that that was something not
9 raised previously.

10 MR. ECKSTEIN: Excuse me, your Honor. We
11 objected to the motion. I don't think we were expected to
12 fly spec the order.

13 MR. FREDERICKS: And I also believe that --
14 this is Ian Fredericks for the ULC2 indentured trustee.

15 I also believe that we did raise that in
16 our papers, that the escrow should be established and that
17 it should not be discretionary. And I believe Mr. Dunphy
18 also addressed that in his submissions.

19 MR. SELIGMAN: Your Honor, that --

20 JUDGE LIFLAND: That should not be a deal
21 breaker.

22 MR. SELIGMAN: Right. Obviously that is --
23 it's a directive as to CCRC, one of the Canadian debtors.
24 I guess we can deal with that. Obviously that's not my --
25 that's not the US debtors' issue to sign-off on that.

1 Perhaps we can refer that to Canadian debtors' counsel in a
2 moment.

3 JUDGE LIFLAND: Well, it's precatory, it's
4 suggested by the US court, but you are correct that is more
5 the for the Canadian debtor to accept.

6 Let's get to the other forms of objection
7 by Mr. Eckstein with respect to wanting to know about the
8 majority.

9 MR. SELIGMAN: Well, your Honor, the
10 holdings of the ULC1 ad hoc committee, which they allege in
11 their papers they represent a majority, they were filed
12 with this court under seal. So I think your Honor has them
13 and can take notice of them.

14 JUDGE LIFLAND: I do have them, Mr.
15 Eckstein. I do take notice of them, and I do find from
16 those papers they purport to represent the majority. And
17 they have communicated that, I believe, to the indentured
18 trustee in full detail.

19 MR. ECKSTEIN: Your Honor, I was not aware
20 of that fact. And obviously I haven't seen anything that
21 was filed under seal, so I am not in a position to respond
22 to whatever was filed, your Honor.

23 JUDGE LIFLAND: Is there anything else?

24 MR. SELIGMAN: I think those were the
25 issues raised by Mr. Eckstein.

1 JUDGE LIFLAND: With respect to what I have
2 left on my plate, and that is the objections. One is
3 withdrawn. To the extent that there are any others, I will
4 rule on the other objections.

5 And perhaps My Lady and I might prepare for
6 about five minutes and then come back and inform you as to
7 how we decide to further proceed.

8 JUSTICE ROMAINE: Judge Lifland, if I can
9 say, I believe there are a couple of comments to be made
10 with respect to the changes here. If we can just allow
11 that first.

12 JUDGE LIFLAND: Certainly.

13 JUSTICE ROMAINE: Mr. Carfagnini wishes to
14 speak.

15 Go ahead, Mr. Carfagnini.

16 MR. CARFAGNINI: Jay Carfagnini for the
17 Canadian debtors. I just want to say there are some
18 changes that are going to have to be made to the Canadian
19 order to conform. We are happy to take those changes
20 certainly to the US counsel. And perhaps what would make
21 sense is for the US to appear before Judge Lifland when it
22 suits them and us to submit the orders to you for Canada.
23 These are not, in our view, substantive change, and we are
24 confident by the cooperation that we've received from
25 counsel so far, will be achieved again.

1 On the one point raised by Mr. Seligman and
2 Mr. Eckstein about the funding of the escrow, the term will
3 be shall. We are happy to do that. That is the intention
4 and always has been.

5 JUSTICE ROMAINE: Okay. Anything, Mr.
6 Dunphy? Mr. Thornton?

7 MR. THORNTON: No.

8 JUSTICE ROMAINE: Thank you.

9 Judge Lifland, you are suggesting that we
10 now adjourn for how long?

11 JUDGE LIFLAND: About five or ten minutes.
12 And we can come back and either rule or advise the people
13 whether there is any need for any further proceeding.

14 JUSTICE ROMAINE: Okay. Let's take ten
15 minutes, if you don't mind?

16 JUDGE LIFLAND: Sure.

17 (Recess taken)

18 THE CLERK: We are ready in Calgary
19 whenever you are.

20 MS. HEALY: Okay.

21 JUSTICE ROMAINE: Thank you. Please be
22 seated.

23 JUDGE LIFLAND: Thank you all for your
24 patients. What happened to the microphone?

25 Can you hear me?

1 JUSTICE ROMAINE: We can hear you better
2 than we could before.

3 JUDGE LIFLAND: I understand there was a
4 part missing.

5 JUSTICE ROMAINE: Of the microphone.

6 JUDGE LIFLAND: Of the microphone. I thank
7 you all.

8 (Laughter.)

9 JUSTICE ROMAINE: It's been a long day,
10 Judge Lifland.

11 JUDGE LIFLAND: Even longer here. It's
12 well passed the dinner hour here, who probably spent the
13 last 10 minutes phoning home saying hold dinner for them.

14 We are here in this segment of the
15 proceeding do deal with the settlement that comes under
16 Rule 9019 of the Bankruptcy Code. And as our Second
17 Circuit Court of Appeals recently noted, there is little
18 doubt that the settlements of disputed claims facilitate
19 the efficient functioning of the judicial systems. In
20 Chapter 11 bankruptcies, settlements also help clear a path
21 for the efficient administration of the bankruptcy estate,
22 including any eventual plan of reorganization. Before
23 pre-plan settlements can take effect, however, they must be
24 approved by the Bankruptcy Court pursuant to Bankruptcy
25 Rule 9019. Motorola, Inc. against Official Committee of

1 Unsecured Creditors known as (In re Iridium Operating LLC)
2 478 F.3d 452,455 Second Circuit 2007 a short time ago.

3 Bankruptcy Rule 9019 has a "clear
4 purpose.... to prevent the making of concealed agreements
5 which are unknown to the creditors and unevaluated by the
6 court." Id. In determining whether to approve a proposed
7 settlement, the court's responsibility is not to decide the
8 numerous issues of law and fact implicated by the
9 settlement "but rather to canvas the issues and see whether
10 the settlement falls below the lowest point in the range of
11 reasonableness." Cosoff against Rodman (In re W.T. Grant
12 Co.) 699 F2.d 599, 608 (Second Circuit 1983.)

13 Courts in the Second Circuit have developed
14 standards to evaluate if a settlement as fair and equitable
15 based upon the original framework announced by the United
16 States Supreme Court in TMT Trailer Ferry. Protective
17 Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.
18 against Anderson, 390 U.S. 414 (1968). Those interrelated
19 factors are: (1) the balance between the litigation's
20 possibility of success and the settlement's future
21 benefits; (2) the likelihood of complex and protracted
22 litigation, with its attended expense, inconvenience, and
23 delay, including the difficulty in collecting on the
24 judgment; (3) the paramount interests of the creditors,
25 including each affected classes' relative benefits and

1 degree to which either creditors do not object to or
2 affirmatively support the proposed settlement; (4) whether
3 other parties in interest support the settlement; (5) the
4 competency and experience of counsel supporting, and the
5 settlement; (6) the nature and breadth of releases to be
6 obtained by officers and directors; and (7) the extent to
7 which the settlement is the product of arms-length
8 bargaining. In re Iridium Operating LLC 478 F.3d at
9 461-462 citing TMT Trailer Ferry, 390 U.S. at 424.

10 Here the settlement resolves all material
11 disputes between the US debtors and the Canadian debtors
12 without the costly and time consuming cross-border
13 litigation that would otherwise ensue. The settlement will
14 cause the elimination of billions of dollars of claims
15 against the US debtors' estates, enable the debtors to
16 proceed with the Greenfield Energy Center project and give
17 the debtors a 75 million dollar charge against the net
18 proceeds realized by the Canadian debtors from the sale of
19 the CCRC ULC1 senior notes. Although the settlement does
20 not resolve the guarantee claims by the fund against the US
21 debtors, it creates a process for resolving those claims.
22 The settlement also provides for an equitable division
23 between the US and Canadian debtors of the proceeds of the
24 sale of Calpine's subsidiary Thomassen Turbine Systems, and
25 may possibly result in a distribution to US debtors on

1 account of their equity interest in certain of the Canadian
2 debtors and allows the US debtors to move forward with the
3 confirmation process.

4 The settlement agreement has universal
5 support in the US by creditors, equity holders, ad hoc
6 committee of second lien debt holders and the note holders.
7 The creditors' committee and the equity committee have both
8 filed statements in support of the settlement. The only US
9 objection was filed by HSBC as indentured trustee for ULC1
10 notes but that objection was resolved by the parties. The
11 settlement provides for payment in full of all principal
12 and interest (including compound interest) owing under the
13 ULC1 notes allowing the trustee's claim in the amount of
14 approximately 3.5 billion dollars, which is 1.65 times the
15 filed amount of the trustee's claim for the principal
16 amount of the ULC1 bonds outstanding (i.e. approximately
17 2.12 billion dollars). The form of currency of the ULC1
18 bondholders will receive in the Chapter 11 cases is an
19 issue to be addressed in the context of plan confirmation,
20 where ULC1 bondholders and others will have the opportunity
21 to vote for or against a plan as provided by the Bankruptcy
22 Code.

23 Holders of a majority of each series of the
24 ULC1 notes have delivered to HSBC a direction and indemnity
25 letter directing HSBC the enter into the settlement

1 agreement and indemnifying HSBC against any losses suffered
2 as a result of doing so. In addition, wide spread notice
3 was given to all note holders directly by mail and through
4 extensive publication and none have objected.

5 Accordingly, I find that the settlement is
6 fair and equitable, well above the lowest rung in a range
7 of reasonableness, and indeed well within the zone of
8 reasonableness, and indeed is in the best interest of the
9 debtors, their estate, creditors and stakeholders.

10 And I will entertain the order approving
11 the settlement consistent within the like order to be
12 submitted to Canadian court.

13 That is my ruling.

14 JUSTICE ROMAINE: Thank you, Judge Lifland.

15 I will give my decision orally with brief
16 reasons, more detailed written reasons will follow later
17 this week dealing more specifically with the various
18 objections raised by the ad hoc committee, the ULC2 trustee
19 and the Fund.

20 I start by accepting that if the global
21 settlement agreement were a plan of arrangement or
22 compromise, a vote by creditors would be necessary under
23 Canadian law. However, I am satisfied, after careful
24 analysis of its terms, that the settlement agreement is not
25 a plan compromise or arrangement with creditors.

1 Under the terms of the settlement agreement
2 objecting creditors either will be paid in full and thus
3 not compromised, or will continue to have the same claims
4 against the same entities. Those claims will be
5 adjudicated, and if they are determined to be valid, the
6 settlement agreement provides a mechanism for their full
7 payment or satisfaction, other than for the possibility of
8 a relatively small deficiency for some creditors of CESCA
9 whose claims are not guaranteed by the US creditors. Those
10 creditors have not objected to the settlement agreement,
11 and, in fact, the largest group, the gas transportation
12 claimants, have appeared before me today to support the
13 approval of the settlement agreement on the basis that it
14 improves their chances of recovery, resolving as it does,
15 all the major cross-border issues that have impeded the
16 progress of this preceding.

17 I am satisfied that no rights are being
18 confiscated under the settlement. Some claims are
19 eliminated, but only with the full consent of the parties
20 directly involved in those specific claims. The existing
21 claims of the ULC trustee are replaced with redesignated
22 claim; however, the financial effect of the redesignated
23 claims is the same. The ULC2 trustee's right to assert the
24 full amount of its claims remains, and the Canadian debtors
25 and the US debtors have agreed to hold funds in escrow

1 sufficient to satisfy the entirety of those claims once
2 settled or judicially determined.

3 It is true that the settlement will have
4 implications for the value of the Canadian estate. On an
5 overall basis the effect of the settlement on the funds
6 available for distribution to Canadian creditors is
7 positive; however, the settlement also has implications for
8 the funds available to creditors on an entity by entity
9 basis. Settlements often do affect the size of the estate
10 available for distribution, whether they are settlements of
11 a single issue such as a simple claim of a lien holder or
12 this settlement of the major issues that have impeded the
13 resolution of this very complex cross-border insolvency.
14 Settlements sometimes result in less money being available
15 to non-settling creditors, that is why they require court
16 approval and consideration of whether the settlement is
17 fair, reasonable and beneficial to creditors as a whole.

18 It is clear that court approval of
19 settlements can be, and often is, given over the objections
20 of one or more parties. The Court's ability to do this is
21 a recognition of its authority to act in the greater good,
22 particularly in the insolvency context. Viewed against
23 this test, the settlement agreement is a remarkable step
24 forward in resolving this CCAA filing. It eliminates
25 approximately 7.4 billion dollars in claims against the

1 CCAA debtors. It resolves the major issues between the
2 Canadian debtors and the US debtors that had stalled
3 meaningful progress and asset realization and claims
4 resolution. Most significantly, it unlocks the Canadian
5 proceeding and provides the mechanism for the resolution by
6 adjudication or settlement of the remaining issues and
7 significant creditor claims and the clarification of
8 priorities.

9 The monitor has concluded, through careful
10 and thorough analysis, that the likely outcome of the
11 implementation of the settlement agreement is payment in
12 full of all Canadian creditors. As the ad hoc committee of
13 creditors of Calpine Canada Resources Company concedes, the
14 settlement removes the issues that the members of the
15 committee have recognized for many months as the major
16 impediment to progress.

17 The sale of the CCRC ULC1 notes is a
18 necessary precondition to resolution of this matter. But
19 contrary to the ad hoc committee's submissions, that sale
20 cannot occur otherwise than in the context of a settlement
21 with those parties whose claims directly affect the notes
22 themselves. I'm satisfied that the settlement agreement is
23 a reasonable and indeed necessary path out of the deadlock.
24 I am persuaded that the settlement agreement provides clear
25 benefits to the Canadian creditors of the CCAA applicants

1 as a whole, and that on an individual basis no creditor is
2 worse off as a result the agreement. While it does not
3 guaranty full payment of claims, the settlement agreement
4 substantially reduces the risk that this goal will not be
5 achieved. Crucially the settlement agreement is supported
6 and recommended unequivocally by the monitor who was
7 involved in the negotiations and who has analyzed its terms
8 thoroughly.

9 I am mindful that the settlement agreement
10 is not without risk to the fund; however, that the
11 outstanding risk falls upon the fund does not make the
12 settlement unfair. As the applicants point out,
13 particularly in the insolvency context, equity is not
14 always equality. Given the monitor's assessment that the
15 risk of less than full payment to the CESCA creditors is
16 relatively remote, I am satisfied that such risk does not
17 obviate the fairness of the settlement.

18 This settlement agreement is without
19 precedent in this breath and scope. This is perhaps
20 appropriate given the enormous complexity and highly
21 intertwined nature of the issues in this proceeding. The
22 cross-border nature of many of the issues adds to the
23 delicacy of the matter. Given that complexity, it behooves
24 all parties in this court to precede cautiously and with
25 careful consideration; nevertheless, we must proceed

1 towards the ultimate goal of achieving resolution of the
2 issues. Without that resolution, the Canadian creditors
3 face protractive litigation in both jurisdictions,
4 uncertain outcomes, and continued frustration in unraveling
5 the guardian knot of intercorporate and interjurisdictional
6 complexities that plagued these proceedings on both sides
7 of the border.

8 In my view the settlement agreement
9 represents enormous progress, and I commend all parties for
10 the efforts necessary to achieve it. I'm prepared to
11 approve the settlement agreement.

12 Okay. Judge Lifland?

13 JUDGE LIFLAND: Thank you, My Lady. I,
14 too, would like to express my appreciation to all, both pro
15 and con with respect to the settlement. I think the
16 advocacy has been excellent, the argument excellent, and
17 the effort that was put in in coordinating and cooperating
18 in order to get to this point and to clarify issues has
19 been rewarding for this side of the bench, as well as, I
20 assume, the others. And it goes again to demonstrate the
21 desirability of approaching these cross-border matters
22 through the medium of a protocol to allow us all to get
23 access and recognition to our respective courts that way
24 and to appear and be heard appropriately.

25 Thank you all. And thank you, My Lady.

1 JUSTICE ROMAINE: Thank you, Judge Lifland.

2 MR. CARFAGNINI: My Lady, just one last --
3 this is Peter Linder on behalf of the Canadian debtors.

4 Just one last motion that I would like to
5 bring on behalf of all here, and its done both before you
6 and before Judge Lifland. And in my usual style it's
7 without notice, but I want to bring this notice of thanks
8 on behalf of all participants for hearing us today, and to
9 thank your clerks for assisting us in carrying this joint
10 border joint hearing.

11 JUSTICE ROMAINE: Thank you, Mr.
12 Carfagnini.

13 MR. LINDER: My Lady?

14 JUSTICE ROMAINE: Is this something that
15 Judge Lifland should hear?

16 MR. LINDER: I believe it is, My Lady.

17 JUSTICE ROMAINE: Okay.

18 MR. LINDER: Judge Lifland, Justice
19 Romaine, first of all I would like to support the motion of
20 thanks to both of you for sitting through a very long day
21 and for obviously giving this matter great attention. It's
22 Peter Linder on behalf of Calpine Power L.P. And my
23 instructions are immediately seek leave to appeal the order
24 that's been granted today by this court, and to expedite an
25 appeal forward of it.

1 As such, My Lady, under the practice of the
2 court and under Rule 341 of the overall rules court, the
3 practice is first to seek an appeal or to seek a stay of
4 your order on the basis that in the absence of a stay, any
5 appeal would be rendered nugatory.

6 My Lady, as you are likely aware, the test
7 for stay pending appeal is tripartite test. I have an
8 excerpt for action both under Rule 340 and under Rule 508
9 that perhaps I can just hand up.

10 MR. CARFAGNINI: Perhaps I can get
11 clarification. My friend is seeking the stay from this
12 court today, or advising this court that he's going to be
13 seeking a stay from the Court of Appeals.

14 JUSTICE ROMAINE: Mr. Linder, do you want
15 to answer that?

16 MR. LINDER: May I answer?

17 JUSTICE ROMAINE: Go ahead.

18 MR. LINDER: My Lady, Rule 341 of the
19 overall rules of the court allow us to seek a stay
20 initially from this court, the court that granted the
21 order --

22 JUDGE LIFLAND: May I interject?

23 As far as I know, the order has not been
24 signed by either court. And it is, under our procedure,
25 that you appeal from an order.

1 MR. LINDER: Quite so, your Honor.
2 However, under our practice, we would typically raise this
3 issue at the earliest possible time, and we would seek a
4 stay from the judge that granted the order.

5 JUSTICE ROMAINE: Two things. Thank you,
6 Judge Lifland.

7 I think what I would like to do is finish
8 the procedure with respect to the orders and the business
9 that we have today. I understand the necessity of you
10 bringing your application for a stay quickly. I doubt that
11 Judge Lifland needs to be part of that, so after we've
12 finished with the orders, let's finish this cross-border
13 joint hearing and then I'll hear you on the stay, Mr.
14 Linder.

15 MR. LINDER: Thank you, My Lady, that's
16 more than fair.

17 JUSTICE ROMAINE: Thank you.

18 MR. SELIGMAN: Your Honor, David Seligman.
19 We're going to finalize the orders and circulate them both
20 to chambers most likely first thing in the morning. So we
21 will send those over as soon as we are done with those.

22 And I would like to express, Mr. Carfagnini
23 beat me to the punch, but I would like to express my thanks
24 especially to the court and their staff for staying late on
25 a Tuesday.

1 JUDGE LIFLAND: Very well, thank you all.

2 JUSTICE ROMAINE: Okay, thank you. Thank
3 you, Judge Lifland. And I gather that perhaps I'll see the
4 order in the morning as well, Mr. Meyers?

5 MR. MEYERS: There's still some changes on
6 the ULC1 provisions of the settlement of the global order.
7 The other two orders, the bond sale and the agreement sale
8 order, have no changes.

9 JUSTICE ROMAINE: I'm prepared to grant
10 those orders today.

11 Judge Lifland.

12 JUDGE LIFLAND: As am I.

13 JUSTICE ROMAINE: Okay. And I think we're
14 done with the joint portion?

15 JUDGE LIFLAND: I think this joint hearing
16 is concluded, and I thank you all.

17 JUSTICE ROMAINE: Thank you, Judge Lifland.

18 (Time noted: 8:00 p.m.)

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C E R T I F I C A T E

STATE OF NEW YORK }
 } ss.:
COUNTY OF WESTCHESTER }

I, Denise Nowak, a Shorthand Reporter
and Notary Public within and for the State of
New York, do hereby certify:

That I reported the proceedings in the within entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this _____ day of
_____, 2007.

Denise Nowak

Digitally signed by Denise Nowak
DN: cn=Denise Nowak, c=US
Reason: I am the author of this
document
Date: 2007.08.30 15:15:04 -04'00'

DENISE NOWAK